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“The Friendship of the People”: Citizen Participation in Environmental Enforcement

Mark Seidenfeld*
Janna Satz Nugent**

Introduction

Writing in 1513, Niccolò Machiavelli, Second Chancellor to the Florentine Republic, professed that even the most powerful leaders in the world would one day require “the friendship of people.”¹ Respecting environmental regulation, his prophecy has never been truer than it is today. Administrative agencies like the Environmental Protection Agency (“EPA”) struggle to maintain control over rapidly growing industries. Without citizen participation, the agency lacks both the financial and human resources necessary to enforce environmental laws. Therefore, perhaps it is not surprising that since 1970 almost every environmental statute has provided for “citizen suits” enabling private entities to bring judicial actions to enjoin, and in some instances to penalize, alleged violators of environmental regulatory requirements. But regulators and citizen enforcers do not always agree about the proper mechanism or model of environmental enforcement. In particular, citizen participation in enforcement threatens to undermine cooperative approaches to regulatory enforcement that promise to improve the performance of environmental programs. This Article explores how the federal government might alter its mechanisms for environmental enforcement to retain the benefits that come from citizen participation without forfeiting the efficacy that flows from cooperative approaches to regulation.

To understand the impact of citizen participation on environmental regulatory enforcement, one must recognize that different types of public interest groups bring citizen suits for different reasons.² Some groups are controlled

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¹ NICCOLÒ MACHIAVELLI, *THE PRINCE* 69 (George Bull trans., Penguin Classics ed. 1981) (1513) (recognizing the potential for political dissension in a constitutional principality and concluding that “it is necessary for a prince to have the friendship of the people; otherwise he has no remedy in times of adversity”).

² For a general description of the typology of interest groups based on control and funding, and the motivations likely to attach to each type of group, see Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 428–39 (2000).

by individuals directly affected by regulatory violations and are motivated to stop the resulting pollution at all costs. Others follow the dictates of their central staffs, whose salaries may be paid out of awards from citizen suits. Such groups may be more concerned with ancillary payments than with stopping pollution. Yet other groups depend heavily on financial support from a broad-based membership. Leaders of such a group may seek headlines that will aid the group in attracting members and, only derivatively, in reducing environmental risks.

Regulators, too, may have various enforcement goals. Regional EPA offices, responsible for direct federal enforcement of environmental regulations,³ are often evaluated on the number of problems they resolve or the magnitude of the fines they collect, rather than on whether the resolution prevents harmful pollution at reasonable cost.⁴ These offices recognize that the cooperation of regulated entities can greatly reduce enforcement costs, which in turn will allow regulators to increase the number of violations they address, even if they must forfeit strict compliance to induce cooperation. They might also sacrifice strict or timely compliance for settlements that allow them to report that violations have been resolved. Regional offices also work closely with state enforcement agencies,⁵ and therefore may be prone to take into account state concerns about the cost that strict compliance will impose on companies that provide jobs and other benefits to local economies. Hence, these offices might favor enforcement approaches that help a violator come into essential compliance with standards, even if this takes longer or allows some regulatory technicalities to go unmet. In contrast, agency staff members within the EPA central office who help the Department of Justice ("DOJ") prosecute civil enforcement actions often join the agency out of commitment to the environment.⁶ They also interact with EPA program offices, which write the regulations and hence tend to be committed to their enforcement.⁷ For both of these reasons, central staff members involved in enforcement are apt to prefer strict compliance with regulatory re-

³ For a description of the role of the EPA's regional and central offices in enforcing regulatory requirements, see R.I. Van Heuvelen & Linda K. Breggin, *Citizen Participation in U.S. Environmental Enforcement*, 1 PROC. INT'L CONF. ON ENVTL. ENFORCEMENT 573, 573-74 (1992).

⁴ See Clifford Rechtschaffen & David L. Markell, *Improving State Environmental Enforcement Performance Through Enhanced Government Accountability and Other Strategies*, 33 ENVTL. L. REP. (Envtl. L. Inst.) 10,559, 10,564 (2003) (explaining why EPA enforcement evaluations are based on agency outputs rather than on pollution reduction).

⁵ See *id.* at 10,559; cf. Peter J. Fontaine, *EPA's Multimedia Enforcement Strategy: The Struggle to Close the Environmental Compliance Circle*, 18 COLUM. J. ENVTL. L. 31, 47-48 (1993); David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, 30-61 (2000) (providing an overview of the state/EPA enforcement relationship).

⁶ See JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 67 (1989) (noting that an agency tends to attract staff members who agree with its mission); Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311, 353 (1991) ("EPA . . . employees choose to work there primarily out of their sense of sharing in the agency's perceived mission rather than for more tangible rewards."); see also Van Heuvelen & Breggin, *supra* note 3, at 573.

⁷ See Fontaine, *supra* note 5, at 47.

quirements. Of course, their actions are subject to oversight by political appointees, whose relationship to the Capitol and White House may influence them to relieve significant political contributors from regulatory burdens or to try to deliver benefits to various constituencies different from those that statutes and regulation were intended to serve.

The various goals of citizen groups and regulators for resolving regulatory violations, therefore, often conflict. One cannot simply dismiss the goals of either the interest groups or regulators because each is an important cog in current environmental enforcement mechanisms. If citizen groups are permitted to control enforcement, they might force compliance with the letter of the regulation when the costs of doing so are prohibitive or extort side payments as part of settlements that benefit those who control the group but not society as a whole. Without the discipline of potential citizen suits, however, regulators may simply succumb to a dearth of resources or sell out to the complaints of business, agreeing to sweetheart deals to get industry off their backs and cases off their dockets.

This Article examines and suggests some possible approaches to reconcile the conflicts between the enforcement goals of regulators and citizen groups. In examining the relationship between private citizens and modern enforcement, it begins with a description of enforcement mechanisms, from informal administrative responses to civil enforcement and citizen suits.⁸ Next, the Article examines why modern enforcement efforts fail to achieve universal compliance and outlines the debate on whether deterrence, cooperation, or some other method of control should stand as the model for environmental enforcement. Finally, after a review of the various roles that private citizens play within the enforcement program, this Article explores potential solutions to the delicate balance between flexibility and citizen input in enforcement. It concludes by describing how these solutions could operate within the currently used mechanisms of regulatory enforcement and suggesting which solutions are most promising in the context of particular enforcement mechanisms.

I. Mechanisms of Agency Enforcement

Congress has codified a variety of enforcement mechanisms designed to allow the EPA to reach the ultimate goal of compliance with environmental regulation. Leaving criminal enforcement aside,⁹ these mechanisms fit three

⁸ This Article focuses primarily on enforcement actions controlled by the federal government rather than the states. Federal environmental laws authorize state governments to implement federal environmental programs within their states; after the state program is approved as consistent with federal requirements, the state supplants the federal government as the primary enforcer of federal environmental law within the state. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7410(a) (2000) (addressing state implementation plans for national primary and secondary ambient air quality standards); Clean Water Act, 33 U.S.C. § 1251(b) (2000) (stating policy of preserving and protecting the “primary responsibilities and rights of States to prevent, reduce, and eliminate pollution”). Experts estimate that nearly seventy percent of all enforcement actions are state initiatives and that the vast majority of inspections are conducted by state officials. Van Heuvelen & Breggin, *supra* note 3, at 584 n.2.

⁹ The scope of this Article excludes the EPA’s criminal enforcement program. Although the EPA maintains a significant criminal enforcement program, citizen participation in the Office

basic categories—administrative enforcement, civil enforcement, and citizen enforcement—and range in levels of formality from informal notices of non-compliance to lawsuits seeking penalties in federal courts.¹⁰ The EPA strives to respond to every violation in a manner befitting the seriousness and circumstances of the violation.

As an initial matter, the EPA must decide whether to get involved in enforcement at all. Experts estimate that states initiate nearly seventy percent of all enforcement actions and that state officials conduct the vast majority of inspections.¹¹ Once a violation has been identified within a state with an approved enforcement program, the federal government's authority and tendency to take over enforcement is reduced. Nonetheless, the Administrator of the EPA ("Administrator") may initiate an enforcement action if a state has failed to respond to a significant concern in a timely and appropriate manner.¹² She may direct enforcement when a party has violated an EPA

of Criminal Enforcement, Forensics, and Training, or in cases referred to the Department of Justice, is extremely limited. This is consistent with our legal system's fundamental notions that: (1) criminal enforcement involves many factors other than balancing deterrence of pollution against the costs of compliance, such as the role of moral culpability as an element of environmental crimes, and (2) citizens do not share responsibility with government for criminal prosecutions. See generally Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L.A. L. REV. 867 (1994); Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407 (1995). For purposes of this Article, it will suffice to note that the EPA initiated 482 criminal cases in 2001; 372 defendants were charged, resulting in almost \$95 million in fines and restitution and in sentences totaling 256 years in prison. Press Release, U.S. EPA, EPA Achieves Significant Compliance and Enforcement Progress in 2001 (Jan. 31, 2002), http://www.epa.gov/epahome/headline_020102.htm (discussing fiscal year 2001 enforcement data released by EPA headquarters).

¹⁰ In *Responsive Regulation*, Ian Ayres and John Braithwaite argue that "compliance is most likely when an agency displays an explicit enforcement pyramid." IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 35 (1992). Figure 2.1 provides the reader with an example of an enforcement pyramid where the proportion of space at each layer represents the proportion of enforcement activity at that level. *Id.* at 35 fig.2.1. The base of the pyramid is labeled "Persuasion." *Id.* This level fills a quarter of the pyramid and therefore represents the greatest amount of enforcement activity. See *id.* The next levels, in order of increasing severity and decreasing activity, include: "Warning Letter," "Civil Penalty," "Criminal Penalty," "License Suspension," and "License Revocation." See *id.* For further explanation of the enforcement pyramid, see generally JOHN BRAITHWAITE, *TO PUNISH OR PERSUADE: ENFORCEMENT OF COAL MINE SAFETY* (1985) (introducing the enforcement pyramid concept).

¹¹ See Van Heuvelen & Breggin, *supra* note 3, at 584 n.2; see also Markell, *supra* note 5, at 32 (reporting that "[s]tates conduct roughly ninety percent of the inspections in this country, and, according to leading state officials, they bring approximately eighty to ninety percent of all enforcement actions").

¹² See, e.g., Clean Water Act, 33 U.S.C. § 1319(a)(1) ("If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply . . . or shall bring a civil action . . ."); Clean Air Act, 42 U.S.C. § 7413(a)(1) ("At any time after the expiration of 30 days following the date on which [the Administrator notifies the State of a violation], the Administrator may . . . bring a civil action . . ."). When a state has initiated enforcement proceedings the EPA may be limited in pursuing its own enforcement action against the violator. See, e.g., *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 902 (8th Cir. 1999) (holding that EPA overstepped its authority under the Resource Conservation and Recovery Act ("RCRA") when it overfiled state agency's enforcement efforts against manufacturer); see also Jerry Organ, *Environmental*

order or consent decree,¹³ and she may rely on emergency powers to take immediate action in the face of an imminent threat to public health or welfare.¹⁴ Once the violation has been detected and a Notice of Violation ("NOV") issued, the Administrator must choose the enforcement mechanism best suited to the severity of the violation and the unique circumstances of the parties involved.

Whether the Administrator is obligated to act upon information that a violation has occurred is a topic of debate fueled on one side by the language of enforcement provisions in popular environmental laws, and on the other by the judicial recognition of the need for prosecutorial discretion. The Clean Water Act states that "[w]henever, on the basis of any information available to him, the Administrator finds that any person is in violation . . . he *shall* issue an order requiring such person to comply . . . or *shall* bring a civil action."¹⁵ Despite this seemingly mandatory language, several circuits have recognized that the Administrator retains discretion to ignore the violation. For example, in *Dubois v. Thomas*,¹⁶ the United States Court of Appeals for the Eighth Circuit applied *Chevron* and concluded that the Administrator's interpretation of the enforcement provision of the Clean Water Act deserved deference and that his duties to investigate or make findings were therefore discretionary.¹⁷ The United States Court of Appeals for the Second Circuit also found that the Administrator had discretion, but avoided the problem of the mandatory language of the Act by finding that the discretion attached to finding a violation rather than to action the Administrator could take once she found a violation.¹⁸ Some district courts, however, have held that

Federalism Part I: The History of Overfiling Under RCRA, the CWA, and the CAA Prior to Harmon, Smithfield, and CLEAN, 30 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,615 (2000); Jerry Organ, *Environmental Federalism Part II: The Impact of Harmon, Smithfield, and CLEAN on Overfiling Under RCRA, the CWA, and the CAA*, 30 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,732 (2000). But see *United States v. Power Eng'g Co.*, 303 F.3d 1232, 1240 (10th Cir. 2002) (holding that EPA had authority to seek financial assurances, despite existence of independent state enforcement proceedings, so long as it provided notice to state environmental agency before commencing action); *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1092 (W.D. Wis. 2001) (holding that settlement between petroleum refinery and state did not operate as legal bar to new prosecution by United States of refinery on same alleged environmental violations under Clean Air Act that implicitly recognized overfiling).

¹³ See, e.g., Clean Air Act, 42 U.S.C. § 7413(b)(2) (enabling the Administrator to commence a civil action "[w]henever [a person] has violated, or is in violation of . . . any rule, order, waiver or permit"); *United States v. Midwest Suspension & Brake*, 824 F. Supp. 713, 730–31 (E.D. Mich. 1993) (finding that violation of an administrative order may result in injunctive relief and civil penalties).

¹⁴ See, e.g., Clean Water Act, 33 U.S.C. § 1364(a) ("[U]pon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons where such endangerment is to the livelihood of such persons, . . . [the Administrator] may bring suit on behalf of the United States.").

¹⁵ *Id.* § 1319(a)(1) (emphasis added).

¹⁶ *Dubois v. Thomas*, 820 F.2d 943 (8th Cir. 1987).

¹⁷ *Id.* at 948–50; see also *Sierra Club v. Train*, 557 F.2d 485, 488–91 (5th Cir. 1977) (finding that the Administrator did not have a duty to issue an abatement order despite use of the word "shall").

¹⁸ See *Council of Commuter Orgs. v. Metro. Transp. Auth.*, 683 F.2d 663, 671–72 (2d Cir.

§ 1319(a)(1) of the Clean Water Act creates a nondiscretionary duty to issue an NOV whenever the Administrator becomes aware that a violation has occurred.¹⁹

A. Administrative Enforcement

After the Administrator is informed of a violation, issues an NOV, notifies the state, and assumes enforcement responsibility, she has discretion to issue an administrative order or penalty.²⁰ If the Administrator issues a compliance order, the order is served on the violator, and a copy of the order is sent immediately to the state in which the violation occurred.²¹ The order specifies the violation and need for compliance but does not take effect until the violator has had the opportunity to meet with the Administrator.²² At this point, the violator and the EPA generally negotiate a reasonable time schedule for achieving compliance.²³ Once set, the schedule is not subject to judicial review,²⁴ but the Administrator is authorized to reward good faith efforts by extending deadlines.²⁵ It is this type of flexibility that encourages cooperation between the regulated entity and the Administrator.

1982) (holding that the mandatory duty to issue notice of violations under the Clean Air Act arises only after the Administrator makes a discretionary finding of violations).

¹⁹ See, e.g., *Greene v. Costle*, 577 F. Supp. 1225, 1227–30 (W.D. Tenn. 1983) (holding that issuance of a compliance order was mandatory); *New Eng. Legal Found. v. Costle*, 475 F. Supp. 425, 433 (D. Conn. 1979) (holding that the Clean Water Act “imposes upon the Administrator a non-discretionary duty to issue a NOV once he finds non-compliance with [state implementation plan] requirements”), *aff’d*, 632 F.2d 936 (2d Cir. 1980); *S.C. Wildlife Fed’n v. Alexander*, 457 F. Supp. 118, 134 (D.S.C. 1978) (explaining that once a violation is reported, the Administrator must issue a compliance order).

²⁰ See Clean Air Act, 42 U.S.C. § 7413(a)(1)(A)–(C) (2000). An NOV is not “final agency action” within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701 (2000), and therefore is not subject to judicial review. See, e.g., *W. Penn Power Co. v. Train*, 522 F.2d 302, 310 (3d Cir. 1975). Issuance of compliance orders under the Clean Water Act is analogous, both in procedure and substance, to EPA authority under the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”) and the Clean Air Act. See, e.g., *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 565 (10th Cir. 1995).

²¹ See, e.g., 33 U.S.C. § 1319(a)(4)–(5) (2000); 42 U.S.C. § 7413(a)(4).

²² See, e.g., 33 U.S.C. § 1319(a)(4); 42 U.S.C. § 7413(a)(4). There is no provision for public involvement in working out the provisions of a compliance order. See, e.g., 33 U.S.C. § 1319(a)(4); 42 U.S.C. § 7413(a)(4).

²³ See, e.g., 33 U.S.C. § 1319(a)(5)(A) (“[The compliance schedule] is not to exceed thirty days in the case of a violation of an interim compliance schedule . . . and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.”).

²⁴ See, e.g., *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1248–60 (11th Cir. 2003) (holding that a compliance order under the Clean Air Act is not reviewable because it has no independent legal force and hence is not final agency action); *Laguna Gatuna*, 58 F.3d at 565 (holding that the Clean Water Act precludes judicial review of compliance orders and citing decisions of the United States Courts of Appeals for the Fourth, Sixth, and Seventh Circuits with similar holdings under both the Clean Water Act and Clean Air Act). *But see* *Allsteel, Inc. v. U.S. EPA*, 25 F.3d 312, 314 (6th Cir. 1994) (explaining that an abatement order under the Clean Air Act, unlike a compliance order, is judicially reviewable because that Act grants judicial review over “any implementation plan . . . or any other final action of the administrator” (quoting Clean Air Act, 42 U.S.C. § 7607(b)(1) (emphasis added))).

²⁵ See, e.g., Clean Water Act, 33 U.S.C. § 1319(a)(5)(B).

Nonetheless, sometimes the EPA determines that the severity and circumstances of a violation demand something more than a compliance order. In these cases, the Administrator, after consulting with the state in which the violation occurred, may issue a civil penalty.²⁶

Civil penalties are divided into two classes. Class I includes penalties totaling less than \$25,000. When the EPA imposes Class I penalties it must notify the alleged violator in writing, and allow the alleged violator "a reasonable opportunity to be heard and to present evidence."²⁷ Class II penalties may not exceed \$125,000 and, when imposing them, the EPA must provide notice and a formal hearing as prescribed by the Administrative Procedure Act.²⁸ The economic ramifications of Class I and Class II penalties differ and in deciding which class of penalties to pursue the Administrator may consider the extent and gravity of the violation, the regulated entity's culpability and ability to pay, and the economic benefit received from the violations.²⁹ In addition to these factors, the Administrator will also consider the administrative burdens posed by the class of penalty she pursues, and both the violator and affected private citizens will have several opportunities to influence the process.

The first opening for the public to involve itself in either a Class I or Class II penalty action occurs when the Administrator publishes notice of her intentions in the Federal Register and accepts comments from the public at large.³⁰ A second entrance opens between the end of the comment period and the issuance of the order. If the penalty falls under Class I, for which the agency need not provide a formal hearing, any person who commented on the proposed penalty may petition the Administrator to set aside the order and provide a hearing.³¹ For Class II penalties, which require a formal hearing, any person who commented on the proposed penalty will be given reasonable opportunity to be heard and to present evidence.³² Once the order becomes final, the violator or any person who commented on the penalty

²⁶ 33 U.S.C. § 1319(g)(1)(B). In fiscal year 2001, the EPA issued 3228 administrative orders and field citations, resulting in over \$23 million dollars in administrative fines. Press Release, *supra* note 9.

²⁷ See 33 U.S.C. § 1319(g)(2)(A).

²⁸ See *id.* § 1319(g)(2)(B) (calling for an "opportunity for a hearing on the record in accordance with section 554 of Title 5"). The Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note (2000), mandates that EPA adjust its civil monetary penalties for inflation every four years. Because of such adjustments, currently the EPA can issue a Class I civil penalty up to \$11,000 per violation or a maximum penalty of \$27,500, and a Class II penalty up to \$11,000 for each day on which the violation occurred or a maximum penalty of \$137,500. Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4 (1999).

²⁹ 33 U.S.C. § 1319(g)(3) (listing factors that may be considered in determining the amount of a penalty).

³⁰ *Id.* § 1319(g)(4)(A) ("Before issuing an order assessing a civil penalty . . . the Administrator . . . shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.").

³¹ *Id.* § 1319(g)(4)(C). The request to set aside the order must take place within thirty days after the issuance of the order. See *id.* If the evidence presented in this petition is material to the violation and was not originally considered, the Administrator may set aside the order, but this is a rare occurrence. More often, the Administrator denies the hearing and publishes the reasons for the denial in the Federal Register. See *id.*

³² *Id.*

may seek judicial review.³³ But a federal court will not set aside *civil* penalties assessed by an agency “unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator’s . . . assessment of the penalty constitutes an abuse of discretion,” and it will not impose additional penalties unless there is a finding of abuse of discretion,³⁴ a standard that requires courts to grant significant deference to agency penalty determinations.

B. *Civil Suit by the Government*

The second category of enforcement mechanisms, broadly labeled civil enforcement, occurs when the Administrator decides to sue the alleged violator in federal court, rather than to pursue an administrative remedy. The government uses such suits to combat recalcitrant violators and imminent threats to the environment.³⁵ The threat of a civil suit provides EPA with added leverage as district courts have authority to grant relief beyond that which is available in administrative enforcement,³⁶ including issuing a temporary or permanent injunction, assessing a civil penalty, and collecting fees owed to the United States.³⁷ If the Administrator decides to initiate a civil enforcement action, the federal government brings an action in district court.³⁸ Upon notice of the Administrator’s intention to prosecute, the EPA’s legal and program offices develop the case and then refer it to the DOJ, which handles all of EPA’s federal cases.³⁹

³³ *Id.* § 1319(g)(8) (“Any person against whom a civil penalty is assessed . . . or who commented on the proposed assessment of such penalty . . . may obtain review of such assessment . . .”). An order becomes final thirty days after its issuance unless a petition for judicial review is filed or an interested person files a petition for a hearing. *See id.* § 1319(g)(5). A notice of appeal must be filed within the thirty-day period beginning on the issue date of the civil penalty order. *See B.J. Carney Indus. Inc. v. U.S. EPA*, 192 F.3d 917, 920 (9th Cir. 1999) (characterizing the plaintiff’s appeal of a civil penalty as untimely because it was filed more than thirty days after the A.L.J.’s order), *vacated pursuant to settlement* by 200 F.3d 1222 (9th Cir. 2000).

³⁴ 33 U.S.C. § 1319(g)(8)(B).

³⁵ *See* Clean Air Act, 42 U.S.C. § 7413(a)(1) (2000) (authorizing the Administrator to bring a civil action “[w]henever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement”). The EPA frequently will use a compliance order to try to work out a compliance schedule and not seek penalties unless the violator refuses to follow the compliance order. For discussion of authority to issue compliance orders, *see supra* note 22 and accompanying text.

³⁶ In fiscal year 2001, the EPA won injunctive relief valued at \$4.3 billion, and violators paid \$125 million in civil penalties, with an additional \$25.5 million going to states in shared penalties. Press Release, *supra* note 9.

³⁷ *See* Clean Water Act, 33 U.S.C. § 1319(b) (“[S]uch court shall have jurisdiction to restrain such violation and to require compliance.”); Clean Air Act, 42 U.S.C. § 7413(b) (The district court has jurisdiction “to restrain such violation, to require compliance, to assess such civil penalty, to collect any fees owed to the United States . . . and any noncompliance assessment and nonpayment penalty.”).

³⁸ *See* Clean Water Act, 33 U.S.C. § 1319(b) (“Any action . . . may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business . . .”); Clean Air Act, 42 U.S.C. § 7413(b) (“Any action . . . may be brought in the district of the United States for the district in which the violation is alleged to have occurred, or is occurring, or in which the defendant resides, or where the defendant’s principal place of business is located . . .”).

³⁹ Van Heuvelen & Breggin, *supra* note 3, at 573–74. EPA guidelines on “parallel pro-

The Federal Rules of Civil Procedure determine a citizen's right to intervene in a federal case. Rule 24(a) provides that anyone shall be permitted to intervene in an action when a statute of the United States confers an unconditional right to intervene.⁴⁰ Several environmental statutes grant intervention as a matter of right.⁴¹ To satisfy either statutory requirements or constitutional standing, intervenors must show that the violation adversely affects them.⁴² The standing requirement is not difficult to meet in cases of ongoing violations, although it can be a significant barrier to intervention in cases involving purely past violations.⁴³ For example, in *United States v. Metropolitan St. Louis Sewer District*,⁴⁴ the Missouri Coalition for the Environment ("Coalition") filed a motion to intervene.⁴⁵ Reversing the trial court's denial of the motion, the Eighth Circuit found that the environmental group's 25,000 members may have been adversely affected because the members "visit, cross, and frequently observe the bodies of water identified in the United States' complaint and that from time to time these members use these waters for recreational purposes."⁴⁶ The court did not require the Coalition to explain, much less prove, how the pollution adversely affected its aesthetic

ceedings," where civil or administrative enforcement actions are initiated at the same time as criminal enforcement, provide a glimpse of the DOJ-EPA balance of power:

EPA as the agency responsible for administering the statutes and regulations which are to protect the environment and human health from undue risk, is the appropriate initial determiner of when a hazard or risk exists and its degree of environmental or health significance. The DOJ decides when a matter may be judicially brought and maintained in the Federal courts. An enforcement matter which EPA views as appropriate . . . may be rejected for legal or DOJ policy reasons; however, the initial decision concerning requesting and referral of enforcement matters . . . is that of EPA.

Memorandum from the Office of Enforcement and Compliance Monitoring, to the U.S. EPA (June 21, 1989), <http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/para-proceed-rpt.pdf>.

⁴⁰ FED. R. CIV. P. 24(a). Rule 24(a) further provides that "[u]pon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest." *Id.*

⁴¹ See, e.g., Clean Water Act, 33 U.S.C. § 1365(b)(1)(B) (using similar language as the Clean Air Act: "[I]f the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States . . . any citizen may intervene as a matter of right."); Clean Air Act, 42 U.S.C. § 7604(b)(1)(B) ("[I]f the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States . . . any person may intervene as a matter of right.").

⁴² "Citizen" is defined in the Clean Water Act as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). Even when the statute does not limit intervention to those adversely affected, the constitutional doctrine of standing imposes such a limit. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

⁴³ Standing for a citizen to intervene as a party requires the same interest as for the citizen to bring suit on her own. See, e.g., *United States v. City of Toledo*, 867 F. Supp. 595, 597 (N.D. Ohio 1994). Hence, case law on standing applies to intervention as well. See *id.* The case law holds that citizens generally do not have standing to bring suit based on a past violation unless they can prove that the violation is ongoing or likely to recur. See *infra* note 109.

⁴⁴ *United States v. Metro. St. Louis Sewer Dist.*, 883 F.2d 54 (8th Cir. 1989).

⁴⁵ *Id.* at 55.

⁴⁶ *Id.* at 56.

and use interests. Construed liberally, Rule 24(a) gives a voice to local groups and individuals who may have been silenced by the costs of litigation.⁴⁷ As intervenors, these voices may alter the relationship and existing balance of power between the EPA and its regulated entities, a balance of power that takes on great significance in the negotiation of a settlement agreement.

C. Settlement Agreements

Whether the parties are engaged in administrative or civil enforcement, there is opportunity for both parties to save time and money through settlement.⁴⁸ In agency adjudications, parties may settle their dispute in the form of a written document known as a consent agreement. Civil judicial proceedings may result in a consent decree—a written agreement signed by all of the parties. Both types of settlement agreements allow the parties to accept certain corrective actions, such as administrative fines or permit modifications, without admitting guilt or innocence; a key distinction, however, is that a consent decree, unlike a consent agreement, must be approved by the federal judge presiding over the civil action.⁴⁹ Nevertheless, “[b]ecause enforcement involves the prioritization of agency resources, courts are loathe to get actively involved in the process.”⁵⁰ Judicial review, therefore, is often minimal.⁵¹

One of the most common and controversial features of a settlement agreement is the Supplemental Environmental Project (“SEP”).⁵² A SEP affords violators occasion for penalty reduction, and perhaps rehabilitation of public relations and reputation, through investment in an environmental project unrelated to the violation.⁵³ S.C. Johnson & Son, for example, resolved violations of the Federal Insecticide, Fungicide, and Rodenticide Act by

⁴⁷ See Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 866–67 (1985) (finding that local environmental groups, local citizen groups, and private individuals outnumbered national environmental groups as intervenors nine to one). *But see id.* at 867 & n.85 (finding that courts are “extremely reluctant” to allow third-party intervenors to upset a settlement agreement and citing *United States v. Ketchikan Pulp Co.*, 430 F. Supp. 83 (D. Alaska 1977), and *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968 (2d Cir. 1986)).

⁴⁸ In fiscal year 2001, EPA entered 222 settlement agreements. See Press Release, *supra* note 9.

⁴⁹ See, e.g., *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598, 604 (2001).

⁵⁰ Mark Seidenfeld, *An Apology for Administrative Law in the Contracting State*, 28 FLA. ST. U. L. REV. 215, 236 (2000).

⁵¹ See discussion *infra* notes 273–77 and accompanying text.

⁵² See David A. Dana, *The Uncertain Merits of Environmental Enforcement Reform: The Case of Supplemental Environmental Projects*, 1998 WIS. L. REV. 1181, 1182–83 (explaining that the EPA “clearly . . . lack[s] the authority to simply order violators to undertake SEPs”); see also Notice of Interim Revised EPA Supplemental Environmental Projects Policy, 60 Fed. Reg. 24,856, 24,858 (May 10, 1995) (“The legal evaluation of whether a proposed SEP is within EPA’s authority and consistent with all statutory and Constitutional requirements may be a complex task.”).

⁵³ In 2001, the EPA negotiated SEPs valued at about \$89.1 million, up sixty percent from 2000’s value of \$55.9 million. See Press Release, *supra* note 9.

agreeing to a SEP in 2001 for specialized and preventative health care in Baltimore, Maryland.⁵⁴ The corporation purchased and staffed a Mobile Asthma Clinic for the Asthma and Allergy Foundation of America.⁵⁵ Settlement funds of nearly \$700,000 supported the "Breathmobile" for one year of diagnosis and treatment.⁵⁶ Although most would agree that SEPs promote worthwhile causes, the reality of backroom negotiations and a lack of transparency in the negotiation process makes some fearful of SEPs in general.⁵⁷ The agency may have an institutional interest in getting the violator to take action that the agency cannot directly order, and this interest can encourage the agency to sign off on some projects that might provide insufficient deterrence against future violations or might not be the best means for the violator to rectify the environmental harm it has caused.

Settlement agreements usually result from negotiations between the enforcement arm of the EPA and the violator, and hence can easily fall into regulatory shadows outside the gaze of environmental interest groups. The lack of public involvement in settlement negotiations makes them susceptible to manipulation that can compromise the underlying purposes of the regulatory scheme.⁵⁸ To shed light on settlement negotiation, environmental laws require the Administrator to publish notice in the Federal Register well in advance of any final agreement.⁵⁹ Written comments are accepted and considered and may result in a decision by the Administrator or Attorney General to withdraw from the agreement.⁶⁰ Although citizen participation in settlement agreements ostensibly encourages the agency to negotiate at arm's length, the lack of meaningful judicial review can thwart efforts to open settlement agreements to citizen input. At the same time, however, adding pub-

⁵⁴ OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, U.S. EPA, BEYOND COMPLIANCE: SUPPLEMENTAL ENVIRONMENTAL PROJECTS 23 (2001) (describing the EPA's SEP program and the individual SEPs entered in 2001), <http://www.epa.gov/Compliance/resources/publications/civil/programs/sebrochure.pdf>.

⁵⁵ *Id.*

⁵⁶ See Press Release, *supra* note 9. When the one-year commitment of the SEP is completed, the program will continue through the University of Maryland. See OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, *supra* note 54, at 23.

⁵⁷ See Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 941 (arguing for greater "openness" of regulatory negotiations as a restraint on "administrative arm-twisting" in the settlement process).

⁵⁸ Cf. Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015 (2001) (addressing the principal-agent gap in "rulemaking settlements," which are settlements of lawsuits challenging administrative rules or final agency actions, and discussing ways to subject such settlements to more public scrutiny).

⁵⁹ E.g., Clean Air Act, 42 U.S.C. § 7413(g) (2000) (requiring notice to be published "[a]t least 30 days before a consent order or settlement agreement of any kind . . . is final or filed with a court"). The notice requirement does not apply to settlements of civil or criminal penalties. *Id.*

⁶⁰ See *id.* Regulations issued by the DOJ mandate a thirty-day comment period before entry of judgment on a proposed settlement in federal civil actions to enjoin discharges of pollutants. See Consent Judgments in Actions to Enjoin Discharges of Pollutants, 28 C.F.R. § 50.7 (1999). The DOJ reserves its right to withdraw its consent to the proposed settlement if the comments received indicate that the settlement is "inappropriate, improper, or inadequate." See *id.*

lic interest groups, or "PIGs,"⁶¹ to the trough, so to speak, also poses the threat of unnecessary delay, increased expenditures, and the possibility that the settlement process will break down entirely.

Whether citizen participation in ongoing settlement negotiations is beneficial or whether citizens' comments affect the overall process is not easily determined. As a practical matter, negotiations may span several months, even years, and often times consist of undocumented, informal dealings.⁶² Without documentation, researchers face an almost impossible task of reconstruction because, unlike ordinary judicial opinions that provide readers with factual histories, court approval of a consent decree is most often unpublished or cursory.⁶³

The events leading to final settlement of the 1989 Exxon Valdez oil spill serve as unique documented examples of the negotiation game.⁶⁴ Their uniqueness stems less from the negotiation process than from the national attention and resulting press coverage that the process received. The documentation of the process resulting from this attention provides useful insights into the processes underlying less publicized settlements.

On March 23–24, 1989, the Exxon tanker *Valdez* spilled over eleven million gallons of crude oil into Prince William Sound after striking a reef.⁶⁵ Although the spill occurred in March of 1989, the federal government, the State of Alaska, and the Exxon Corporation (and its subsidiaries) had not yet reached agreement as of February 15, 1991, the day that Exxon rejected the initial proposal to settle the governments' civil claims for \$1.2 billion.⁶⁶ Less than a month later, the parties agreed to a settlement under the authority of the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act. Exxon would pay civil fines of \$900 million to the United States and the State of Alaska over an eleven-year period, with a "reopener" provision for an additional \$100 million for unforeseen injuries and restoration projects.⁶⁷

61 See Seidenfeld, *supra* note 2, at 428 (defining public interest groups as "a group that states as its aim the use of group resources to provide benefits to members who share a diffuse interest in particular regulatory matters"); see also AYRES & BRAITHWAITE, *supra* note 10, at 56–59 (coining the acronym "PIG").

62 See Seidenfeld, *supra* note 50, at 232 ("In many contexts . . . agency procedures fail to provide a visible process that allows those affected to make their concerns known to the agency and ultimately to Congress.").

63 This is one indication of the judiciary's failure to provide meaningful review of settlement agreements or consent decrees. See discussion *infra* notes 272–76 and accompanying text.

64 See *United States v. Exxon Corp.*, No. A-91-082-CV (D. Alaska 1991).

65 See, e.g., Van Heuvelen & Breggin, *supra* note 3, at 576.

66 See *Governments, Exxon Seek Settlement on Liability for 1989 Valdez Oil Spill*, 21 Env't Rep. (BNA) 1903, 1903 (Feb. 22, 1991).

67 See Settlement Agreement Concerning the Exxon Valdez Oil Spill Between the United States, the State of Alaska and the Exxon Corp., Exxon Shipping Co., and Exxon Pipeline Co., 56 Fed. Reg. 11,636 (proposed March 19, 1991) [hereinafter Settlement Agreement]. The Settlement Agreement also assigned \$100 million in fines stemming from criminal charges. *Exxon Agrees to Pay up to \$1.1 Billion to Settle Governments' Oil Spill Cleanup Claims*, 21 Env't Rep. (BNA) 2027, 2027 (Mar. 15, 1991). Exxon agreed to the settlement on March 13. *Id.* Earlier that month, negotiations had been temporarily restrained after five native Alaskan villages filed suit in the United States District Court for the District of Columbia, challenging their exclusion from the closed settlement talks. *Id.* Judge Stanley Sporkin issued a temporary restraining order to bar settlement until he could hear the native Alaskans' claims. *Id.* In their briefs and in oral

The parties published notice of the settlement and invited comments from the public.⁶⁸

The public responded, directly and indirectly influencing the terms of the settlement. Citizens not only submitted comments, some of which were eventually incorporated into the final settlement,⁶⁹ but they also lobbied the Alaskan government.⁷⁰ Under political pressure, Alaska Governor Walter J. Hickel refused to sign off on the deal unless the Alaskan legislature approved it.⁷¹ A total of 107 private citizens testified at House hearings: eighty-one individuals spoke against the agreement, just three supported it, and the rest were undecided.⁷² The House rejected the deal on May 2; by May 3, Governor Hickel and Exxon formally withdrew.⁷³ Ironically, the main concern about the proposed settlement centered on the time schedule for payments: the citizens wanted "more money up front,"⁷⁴ but, by nixing the settlement, they created the potential for even greater delays before Exxon ultimately made any payments.

Following a wave of public criticism of the House's rejection of the settlement, Alaska's governor and the federal government resumed negotiations with Exxon, this time without strings.⁷⁵ The parties reached a new agreement including increased criminal fines and a provision for payment of \$90 million within ten days of the district court's approval of the settlement,⁷⁶ which Judge Holland issued on October 8, 1991.⁷⁷ Barry M. Hartman, then-acting assistant attorney general for the DOJ's Environment and Natural Resources

argument at a March 8 hearing, DOJ attorneys argued "that third parties, including the native Alaskans, would have the right to oppose any settlement because it would take the form of a consent decree which is open for public comment before a federal court." *Id.* at 2028. Unpersuaded, Sporkin described the government's refusal to invite the native Alaskans to the bargaining table as "not fair and not American." *Id.* As a result of the judge's reprimand, the proposed settlement preserved the rights and obligations of Alaska native villages to act as trustees under CERCLA. *Id.* at 2027.

⁶⁸ Settlement Agreement, *supra* note 67, at 11,636 ("Comment is sought from the public concerning the proposed Settlement Agreement. The Agreement provides that the government can withdraw from the Settlement Agreement within 15 days of the close of the comment period if the comments received disclose facts or considerations which show that the Agreement is inappropriate, improper or inadequate, or if, before the end of the 15th day following the close of the comment period, the Alaska State Legislature has not approved the Agreement as written.").

⁶⁹ See Van Heuvelen & Breggin, *supra* note 3, at 576 ("For example, in response to comments from one group, the National Trust for Historic Preservation, a provision was added to the settlement which provided that funds could be used to restore archeological sites.").

⁷⁰ See, e.g., *Alaska House's Rejection of Settlement Spells Death for \$1 Billion Exxon Pact*, 22 Env't Rep. (BNA) 101, 101 (May 10, 1991).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See *Exxon Agrees to Pay \$1.125 Billion to Settle Litigation over Valdez Spill*, 22 Env't Rep. (BNA) 1403, 1403 (Oct. 4, 1991) (noting Governor Hickel's decision not to submit this settlement agreement to the Alaska legislature for its approval).

⁷⁶ See *id.*

⁷⁷ *United States v. Exxon Corp.*, No. A-91-082-CV (D. Alaska 1991). Despite the great magnitude of this settlement, Judge Holland's opinion is unpublished, and I have been unable to get a copy for greater analysis.

Division, touted the penalty plan as "one of the largest . . . of its kind in American history,"⁷⁸ but a senior attorney for the Natural Resources Defense Council ("NRDC") noted that the additional payments represented "only two days of profits for [Exxon], which in the first six months of [1991] reported \$3 billion in profits."⁷⁹ While California Representative George Miller criticized the settlement as an insufficient response to "one of the worst environmental tragedies in this nation's history,"⁸⁰ Governor Hickel remarked on the "high . . . level of cooperation between the state and federal governments and private parties."⁸¹ Whether negotiations were a success is indeed a matter of opinion.

Overall, it is difficult to evaluate the impact of citizen involvement on the settlement process. Most observers are quick to value citizens' participation based on a bottom line—whether the final settlement agreement resulted in higher financial gain for the government.⁸² But the size of the settlement does not account for the intangible costs of delay and is an insufficient indicator of the intrinsic value of citizen participation.⁸³

For example, in the case of the Exxon *Valdez* spill, the State of Alaska and the federal government have spent close to \$700 million on restoration and preservation of parks and wildlife refuges.⁸⁴ But scientists hired to monitor the program "believe that it has shown little progress, that it is 'moving toward a piece-meal, small-scale, project-driven approach,' and that it 'seems to be losing sight of its ecosystem focus as it selects individual species for attention.'"⁸⁵ This myopic approach may be a product of interest group involvement and media attention, which focused on the plight of individual

⁷⁸ *Exxon Agrees to Pay \$1.125 Billion to Settle Litigation over Valdez Spill*, *supra* note 75, at 1403.

⁷⁹ *See id.* (quoting Sarah Chasis of the Natural Resources Defense Council).

⁸⁰ *Id.*

⁸¹ *Id.* at 1404.

⁸² Van Heuvelen & Breggin, *supra* note 3, at 576 (referring to the benefits of citizen comments, noting that they have "yielded, on occasion, changed terms, such as an increase in the amount of the penalties paid").

⁸³ *See, e.g., id.* at 577 ("The primary disadvantage that can result from public participation in settlements is unnecessary delays in entering final enforceable settlements in court."). In *United States v. Amoco Chemical Co.*, for example, citizens who lived next to the BRIO Refinery site in Houston, Texas responded to a notice of settlement with over 100 comments, incorporating several thousand pages of documents. *See id.* Although the United States filed the consent decree in August 1989, the public participation process delayed the approval of the consent decree, which remained in its original form, for almost two years. *See id.*

⁸⁴ FRED BOSSELMAN ET AL., *ENERGY, ECONOMICS AND THE ENVIRONMENT* 428 (2000); *see also* Diane S. Calendine, Comment, *Investigating the Exxon Valdez Restoration Effort: Is Resource Acquisition Really Restoration?*, 9 DICK. J. ENVTL. L. & POL'Y 341, 350–51 (2000) (noting the high percentage of the settlement that went to land acquisitions, despite the fact that sixty-eight percent of the land in Alaska was already federally owned, and that the land was acquired at the expense of native Alaskans who had fought the federal government for decades to gain control of the land in the early 1970s).

⁸⁵ Fred Bosselman, *What Lawmakers Can Learn from Large-Scale Ecology*, 17 J. LAND USE & ENVTL. L. 207, 317 (2002) (quoting COMM. TO REVIEW THE GULF OF ALASKA ECOSYSTEM MONITORING PROGRAM, NAT'L RESEARCH COUNCIL, INTERIM REPORT 27 (2001)). According to Professor Bosselman, "the idea that restoration is the desirable approach may be inconsistent with today's awareness that ecological systems are continually changing." *Id.* at 315.

animals from the moment the accident occurred, creating a public relations incentive for Exxon, and eventually the governments, to spend freely on efforts to save individual otters and birds.⁸⁶ One volunteer who helped to hand-scrub oil off of these animals explained that "Exxon spent \$80,000 per otter that survived the cleaning, but at least half of those are thought to have died soon after they were released. So it was closer to \$160,000 per animal [saved]. . . . [M]oney would have been better spent restoring and protecting habitat."⁸⁷ While it is unfair to claim that misuse of funds would not have occurred without citizen intervention, the roles that citizens played in the process undoubtedly shaped the outcome.

D. Citizen Suits

Citizen suits have contributed to the EPA's ultimate goal of increasing compliance in the regulated community and, in many ways, have acted as sustenance to a starving agency. Plagued with the difficult task of detection,⁸⁸ a lack of resources,⁸⁹ and political constraints,⁹⁰ the EPA has, to some extent, welcomed citizen suits to alleviate the tension created by demand for enforcement that outstrips the agency's supply.⁹¹

Although statutes authorizing private suits to prevent environmental harm predate public enforcement of environmental laws,⁹² the Clean Air Act incorporated the first modern civil suit provision in 1970.⁹³ Since then, almost all major environmental statutes have included citizen suit provisions

⁸⁶ *Id.* at 316.

⁸⁷ *Id.* at 316 n.706 (quotations omitted).

⁸⁸ See Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 190 (discussing the difficulty and cost-prohibitiveness of accurate detection of environmental violations). Although most state and federal laws require continuous monitoring, "practicable and continuous monitors for some forms of emissions are unavailable, on-site monitoring equipment is subject to tampering to disguise high emissions, and midnight dumping of pollutants remains a significant problem." *Id.*

⁸⁹ See Seidenfeld, *supra* note 2, at 461 (noting Congress's failure to provide "sufficient resources" for enforcement under the Clean Water Act) (citing 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, 1558-60 (1995)).

⁹⁰ The level of EPA enforcement activity is heavily influenced by the political ideologies of the president. AYRES & BRAITHWAITE, *supra* note 10, at 8. For example, under the Reagan administration, environmental enforcement actions under the Clean Water Act "dropped to 27 percent of its 1977 peak. But the deregulation produced a backlash, to the point where 1984 enforcement exceeded the 1977 level by 30 percent." *Id.* (citations omitted).

⁹¹ But see ENVTL. LAW INST., CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA-ADMINISTERED STATUTES ix (1984) ("Citizen suits were meant by Congress to operate independently of EPA'[s] [sic] activities and to allow citizens to set their own priorities."); Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Program*, in ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 105, 114-17 (Michael S. Greve & Fred L. Smith, Jr. eds., 1992) (arguing that Congress never planned on universal enforcement and that citizen suits augment the enforcement program beyond Congress's intent).

⁹² See, e.g., Thompson, *supra* note 88, at 195-96 (detailing an English water pollution statute enacted in 1388 under King Richard II that allowed for prosecution by any person who "[felt] himself aggrieved" (quotations omitted)).

⁹³ See Clean Air Act, 42 U.S.C. § 7604(a)(1) (2000) ("[A]ny person may commence a civil

that closely model those in the Clean Air Act.⁹⁴ In essence, Congress has created a cause of action for private citizens to enforce federal environmental regulations by allowing plaintiffs to seek injunctions against ongoing violations and, in some instances, penalties that are paid to the government.⁹⁵

Citizen suit provisions contain notice requirements that were designed to protect the government's position as primary enforcer.⁹⁶ First, at least sixty days prior to initiating a citizen suit, a person must notify the EPA, the violator, and under some statutes, the state where the violation occurred.⁹⁷ This built-in "grace period" gives the EPA approximately two months to analyze the complaint and to decide whether to take over enforcement.⁹⁸ If the government can show that it is already "diligently prosecuting" the alleged violation, the citizen suit is barred, although citizen groups may then intervene in the government's suit.⁹⁹ The EPA cannot stop a citizen suit merely by commencing an administrative enforcement proceeding, although the EPA can bar such a suit by commencing an administrative proceeding prior to notice of the citizen suit or if a citizen group fails to file suit within 120 days of the notice.¹⁰⁰ Finally, once the citizen suit has commenced, a settlement agree-

action on his own behalf against any person . . . who is alleged to have violated . . . an emission standard or limitation under this chapter").

⁹⁴ See, e.g., Endangered Species Act, 16 U.S.C. § 1540(g)(1) (2000) ("[A]ny person may commence a civil suit on his own behalf to enjoin any person . . . who is alleged to be in violation of any provision of this chapter"); Clean Water Act, 33 U.S.C. § 1365(a)(1) (2000) ("[A]ny citizen may commence a civil action on his own behalf against any person . . . who is alleged to be in violation of an effluent standard or limitation under this chapter"); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1) (2000) ("[A]ny person may commence a civil action on his own behalf against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter").

⁹⁵ See, e.g., Clean Air Act, 42 U.S.C. § 7604(a)(3), (g)(1) (granting court jurisdiction to order payment of civil penalties in private suits and providing that such penalties shall be payable to the United States Treasury). Citizens are also authorized to initiate suits against the EPA for failure to perform mandatory duties. See, e.g., *id.* § 7604(a)(2) (allowing a civil action "against the Administrator where there is alleged failure of the Administrator to perform any duty . . . which is not discretionary").

⁹⁶ See, e.g., *id.* § 7604(b)(1)(A). Note that from fiscal years 1985 to 1992, the states, under the aegis of state implementation plans approved by the federal government, performed over ninety percent of all site inspections and initiated over eighty percent of all air, water, pesticide, and hazardous waste enforcement actions. David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authorization Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1572 (1995). Thus, the state and federal governments, together, were the "original" primary enforcers.

⁹⁷ See, e.g., 42 U.S.C. § 7604(b)(1)(A) (disallowing action "prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order").

⁹⁸ Boyer & Meidinger, *supra* note 47, at 849.

⁹⁹ See, e.g., Clean Water Act, 33 U.S.C. § 1365(b)(1)(B) (barring commencement of a private civil suit "if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States, or a State to require compliance . . . , but in any such action in a court of the United States any citizen may intervene as a matter of right").

¹⁰⁰ *Id.* § 1319(g)(6). For an in-depth discussion of the courts' interpretation of "court" and "diligently prosecuting" for purposes of 33 U.S.C. § 1365(b)(1)(B), see Hodas, *supra* note 96, at 1625-32 (analyzing whether an administrative action is an action in a "court" and whether there is a presumption that the EPA or a state has diligently prosecuted an action).

ment or consent order may not be entered until the DOJ and EPA receive a forty-five day notice.¹⁰¹ In theory, these notification requirements keep the crown on the sovereign enforcer: the EPA's diligent prosecution bars a citizen suit, and even its failure to prosecute does not forfeit its right to block a settlement negotiated by the private parties.¹⁰²

But reality often diverges from theory. The balance between public and private enforcement shifted in 1982 with the emergence of national and regional environmental groups that were well-funded and staffed.¹⁰³ Public interest groups studied Discharge Monitoring Reports, which the Clean Water Act requires regulated entities to file, and initiated a plethora of citizen suits under that Act.¹⁰⁴ A year later, private enforcement exceeded federal enforcement efforts, and has been the driving force of environmental litigation ever since.¹⁰⁵ In some years, private enforcement has almost equaled overall government enforcement.¹⁰⁶

Recently, the Supreme Court has used constitutional standing to place significant limitations on plaintiffs' ability to maintain citizen suits. The Court has held that Congress does not create a sufficient interest to grant plaintiffs standing merely by creating a cause of action for citizen plaintiffs.¹⁰⁷ To create an interest that rises to the level of injury in fact, Congress must, at the very least, indicate the interest it means to protect and provide a specific connection between that interest and the plaintiff that Congress empowers to sue.¹⁰⁸ Pragmatically, this means that a citizen suit plaintiff must establish that the defendant's violation is causally related to a concrete injury he suffers. The Court has also held that a citizen plaintiff does not have standing to

¹⁰¹ 33 U.S.C. § 1365(c)(3).

¹⁰² See *id.* § 1365; see also Hodas, *supra* note 96, at 1627. But see ENVTL. LAW INST., *supra* note 91, at III-4 (finding that between January 1, 1978, and April 30, 1984, about ten percent of sixty-day notices led to government enforcement actions); Seidenfeld, *supra* note 2, at 460 ("Pragmatically these provisions do little to limit the power of interest groups because the EPA does not have the resources to prosecute every violation . . . and because sixty days may be an insufficient time for the EPA . . . to demonstrate diligent enforcement." (citation omitted)); Thompson, *supra* note 88, at 200 (finding that sixty days "provide insufficient time for the government to decide whether to intervene" and that "government attorneys frequently are content to allow environmental nonprofits to take the lead in the enforcement actions . . . , enabling the government to focus its limited resources elsewhere.").

¹⁰³ ENVTL. LAW INST., *supra* note 91, at viii.

¹⁰⁴ *Id.*

¹⁰⁵ See Hodas, *supra* note 96, at 1572-73.

¹⁰⁶ *Id.*

¹⁰⁷ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (holding that standing cannot be predicated on a "public right that [has] been legislatively pronounced to belong to each individual who forms part of the public").

¹⁰⁸ See *id.* at 580 (Kennedy, J., concurring). Although the majority in *Lujan* purported to hold that Congress cannot create standing merely by creating a legal right to sue, that majority was created by inclusion of the votes of Justices Kennedy and Souter. But Justice Kennedy, joined by Justice Souter, wrote in concurrence:

In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view. . . . In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.

Id.

sue to prevent future violations by a defendant who has cured past violations prior to the suit being filed, even if the defendant did so in response to the plaintiff's notice of intent to file suit.¹⁰⁹ In addition, although citizen plaintiffs technically can sue to have a violator pay a fine to the United States Treasury, the Court has held that such plaintiffs do not have any interest in having defendants pay the fine unless the plaintiffs can show that the fine will deter future violations.¹¹⁰ Despite these limitations, groups can and do continue to file citizen suits to cure ongoing or threatened future violations of environmental statutes and regulations.¹¹¹

If it is true that "the purpose of the citizen suit provisions is to change behavior by changing incentives,"¹¹² then it is not by chance that an overwhelming majority of civil suits brought by national and regional interest groups were first filed under the Clean Water Act.¹¹³ Originally, the Clean Water Act was the only environmental law that authorized a plaintiff to seek penalties.¹¹⁴ And although the Act provides for defendants to pay court-ordered penalties to the United States Treasury,¹¹⁵ settlement negotiations can provide for environmental mitigation projects that essentially channel payments through third party service organizations that may employ the services of the same individuals responsible for bringing suit in the first place.¹¹⁶

109 See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57-63 (1987) (rejecting plaintiff's argument that Clean Water Act permits suit for purely past violations); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998) (holding that cessation of allegedly harmful activity in response to onset of litigation does not create any "presumption of future injury" that would satisfy injury-in-fact requirement of standing).

110 See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 184-88 (2000). In *Laidlaw*, the Court held that if the defendant continues to violate regulations or a statute after the citizen suit has commenced, then the plaintiff has standing to sue for penalties to be paid to the United States because of the deterrent effect of those penalties, even if the defendant subsequently cures the violation, unless the defendant can prove that the violations will not be repeated. See *id.*

111 ENVTL. LAW INST., *supra* note 91, at vi (finding a "sharp increase" in citizen enforcement between 1982 and 1994).

112 Boyer & Meidinger, *supra* note 47, at 923.

113 ENVTL. LAW INST., *supra* note 91, at vi (reporting that of the 349 citizen suits filed between January 1, 1978, and April 30, 1984, 214 had been brought under the Clean Water Act since 1982).

114 See *Van Heuvelen & Breggin*, *supra* note 3, at 578 (noting that, although "[o]riginally, only the Clean Water Act provided that penalties could be imposed in citizen suits," amendments to environmental statutes such as RCRA, CERCLA, the Clean Air Act, and the Emergency Planning and Community Right to Know Act now allow citizen plaintiffs to seek penalties).

115 See, e.g., *Friends of the Earth v. Archer Daniels Midland Co.*, 780 F. Supp. 95, 101 (N.D.N.Y. 1992) (holding that "it is well established that civil penalties [under 33 U.S.C. § 1319(d) (2000)] must be paid to the United States Treasury").

116 See ENVTL. LAW INST., *supra* note 91, at viii; see also *Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990) ("While it is clear that a court cannot order a defendant in a citizens' suit to make payments to an organization other than the U.S. Treasury, this prohibition does not extend to a settlement agreement whereby the defendant does not admit liability."). Similar provisions are included in the Clean Air Act, which authorizes the court to order that civil penalties, "in lieu of being deposited in [a special fund in the United States Treasury], be used in beneficial mitigation projects which are consistent with" the Clean Air Act. 42 U.S.C. § 7604(g)(2) (2000). The amount is limited to \$100,000. *Id.*

Today, national and regional environmental groups like the Sierra Club, NRDC, and the Atlantic States Legal Foundation are responsible for filing a substantial number of citizen suits.¹¹⁷ As plaintiffs, the groups seek settlement agreements that provide compliance orders, SEPs, monetary penalties, and of course, attorneys' fees.¹¹⁸ This emphasis on financial reward has drawn criticism from those who see cost calculations as a sign of insincerity. At least one observer has noted that although groups may portray themselves as ardent defenders of the environment, they generally choose to prosecute when a company reports numerous violations to the EPA, thereby decreasing discovery costs and increasing the potential for large penalties.¹¹⁹ Supporters of interest groups' reliance on economic "rewards" insist that having violators pay such rewards offsets a corporation's calculated choice to violate environmental regulations.¹²⁰ Moreover, even if the monetary rewards are aimed at self-preservation of the interest groups' *business* of private enforcement, long-term funding may greatly benefit the environment.¹²¹

The propensity of the group to reach a reasonable settlement with the alleged violator varies, depending on the nature of the group bringing suit.¹²² When the plaintiff is a mass membership group, it might prefer the notoriety that comes from pressing for a big penalty to the certainty of a moderate settlement.¹²³ When the plaintiff is a group dominated by a central staff, however, it may be more interested in obtaining attorneys' fees and payments to third-party groups controlled by the same staff than in either making a name for itself or improving the environment.¹²⁴ It is even possible for a national interest group to derive publicity from having prevented the continuation of an ongoing violation while reaping the direct monetary payment of costs and fees.

In fact, there is reason to believe that defendant corporations sometimes prefer negotiating with citizen enforcers rather than with the EPA and DOJ officials.¹²⁵ In 1984, the Environmental Law Institute ("ELI") studied the

¹¹⁷ See Greve, *supra* note 91, at 108.

¹¹⁸ *Id.* at 109–10 (arguing that "[s]ubstantial portions of [settlements resulting from citizen suits] constitute direct transfer payments to environmental groups").

¹¹⁹ See Seidenfeld, *supra* note 2, at 462 (explaining that PIGs' decisions to forgo prosecution of publicly owned wastewater treatment facilities, even though they pollute the water more often than industries, and their filing of claims for recordkeeping violations, which can only indirectly benefit the environment, detract from the groups' professed interest in protecting the environment and point to a stronger incentive for economic relief).

¹²⁰ Boyer & Meidinger, *supra* note 47, at 929 (reflecting an environmental lawyer's belief that corporations would not violate the law if violations resulted in lost profits). Corporate officers are indeed torn between competing interests and duties. For further explanation, see discussion *infra* notes 153–74 and accompanying text.

¹²¹ Seidenfeld, *supra* note 2, at 463.

¹²² For a discussion of the various types of interest groups that might get involved in environmental regulation, see *id.* at 428–34.

¹²³ *Id.* at 430–32.

¹²⁴ *Id.* at 433–34.

¹²⁵ This may reflect the EPA's traditional role as backup enforcer that comes into the picture when state enforcement has failed. See Joel A. Mintz, *Enforcement "Overfiling" in the Federal Courts: Some Thoughts on the Post-Harmon Cases*, 21 VA. ENVTL. L.J. 425, 426 (2003) (noting that the EPA needs to be able to file its own case against violators to protect national enforcement priorities in the face of inadequate state enforcement responses); see also Markell,

negotiation processes leading to settlement of four citizen suits and concluded that interest groups frequently lack the leverage of government enforcers and therefore often settle for amounts below the average consent decree filed by the government.¹²⁶ Although researchers also determined that there is no "typical" citizen suit settlement *process*, they did find common characteristics among the suits.¹²⁷ For example, over half of the cases are initiated by national environmental organizations acting under the Clean Water Act,¹²⁸ and many result in a "relatively fast (and fair) settlement for the large corporation" found in violation of its permit.¹²⁹

The ELI report, similar to the press coverage of the Exxon Valdez settlement, opens a window into backroom negotiations and allows the observer a broad understanding of citizen suit settlements. In the second of four case studies, the report explains how investigations directed by a former EPA enforcement attorney, working under the auspices of NRDC, led to *Sierra Club v. United States Gypsum*.¹³⁰ With the aid of student interns and technical assistants, NRDC reviewed compliance records of all major industrial National Pollution Discharge Elimination System ("NPDES") permits issued in selected states and discovered that the Gypsum facility in Oakfield, New York reported over 125 different violations in less than five years.¹³¹ NRDC subsequently chose to pursue other cases but offered this lead to the Sierra Club and its counsel, a former DOJ environmental enforcement official.¹³²

The Sierra Club sent notice to Gypsum and the EPA on September 17, 1982, and filed its complaint in the Western District of New York on November 23 of that year.¹³³ It alleged that Gypsum operated and continued to operate in violation of its permit effluent limitations and sought an injunction against future violations, discovery of all relevant reports, and an award of civil penalties and costs, including attorney and consultant fees.¹³⁴ Hoping to avoid negative publicity and intervention by EPA, Gypsum's attorney, a former EPA associate general counsel, immediately initiated negotiations; by

supra note 5, at 55 (reporting that generally the EPA has been tougher than states on violators of environmental regulations). This role may justify the EPA using a deterrence-based model after the violator has gamed the states' cooperative interactions.

¹²⁶ ENVTL. LAW INST., *supra* note 91, at IV-16, IV-17. The four case studies were *Sierra Club Legal Defense Fund v. Indiana-Kentucky Electric Corp.*, 716 F.2d 1145 (7th Cir. 1983); *Sierra Club v. United States Gypsum*, No. 82-1078 (W.D.N.Y. 1982); *Citizens Coordinating Committee v. Washington Metropolitan Area Transit Authority*, 568 F. Supp. 825 (D.C. Cir. 1983); and *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331 (4th Cir. 1983). See also Noah, *supra* note 57, at 876-96 (detailing the administrative leverage created by an agency's ability to threaten denial of licenses, dissemination of negative publicity, or imposition of severe sanctions).

¹²⁷ See ENVTL. LAW INST., *supra* note 91, at IV-3.

¹²⁸ *Id.* at IV-4.

¹²⁹ *Id.* at IV-5.

¹³⁰ See *id.* at IV-11, IV-12.

¹³¹ See *id.* at IV-12. The National Pollutant Discharge Elimination System Permit Program regulates wastewater and storm water runoff. From July 1, 1977, to January 31, 1982, Gypsum reported 139 violations of various types. See *id.*

¹³² *Id.* at IV-12, IV-13.

¹³³ *Id.* at IV-13.

¹³⁴ *Id.*

July 13, 1983, the parties were in agreement.¹³⁵ From the start, negotiations centered on remedies.¹³⁶ Like most Clean Water Act cases, there was no reason for Gypsum to dispute the allegations made in the complaint; the violations had been self-reported in compliance with the NPDES program.¹³⁷ But the final consent decree “departed markedly” from the government’s typical consent decree.¹³⁸ Instead of mandating expensive capital improvements, the decree required Gypsum to hire an environmental consultant “to review its current operation and maintenance practices.”¹³⁹ And whereas the EPA generally specifies a certain date for mandatory compliance, this consent decree crossed its proverbial fingers and hoped for compliance at some point in the near future.¹⁴⁰ In lieu of civil penalties, Gypsum agreed to pay \$25,000 to the Open Space Institute, which would spend the funds on an environmental project in New York and credit Gypsum with financing the project in any and all future press releases.¹⁴¹ The parties also agreed to stipulated penalties for future violations or noncompliance with the decree.¹⁴² Finally, Gypsum paid the Sierra Club \$15,000 for costs of litigation and future monitoring.¹⁴³

This case illustrates the strengths and weaknesses of citizen enforcement. While citizen enforcers are free from the political constraints that limit EPA officials, they are constrained by their need to justify their actions to those who provide them with money and other support. They also lack the resources and leverage that the government can bring to demand greater remedies. In dealing with the government, defendant corporations negotiate under the threat of harsh sanctions; but when negotiating with citizen enforcers, the corporations are keenly aware of the interest groups’ incentives to settle.¹⁴⁴ Thus, citizen suit consent decrees often provide just enough relief to avoid EPA intervention and to cover the plaintiff’s attorneys fees and associated costs.

II. Models of Enforcement

The utility of citizen participation in achieving “a credible deterrent to pollution and greater compliance with the law”¹⁴⁵ depends on the behavior of

¹³⁵ *Id.* at IV-13, VI-14.

¹³⁶ *See id.* at IV-13.

¹³⁷ *See id.* at IV-12.

¹³⁸ *Id.* at IV-16.

¹³⁹ *Id.* at IV-14.

¹⁴⁰ *See id.* at IV-16.

¹⁴¹ *Id.* at IV-15.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *See* *Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1352–54 (9th Cir. 1990) (holding that a settlement calling for large payments to private environmental groups, ostensibly to fund efforts to improve water quality, did not violate requirements that civil penalties be paid to the United States Treasury because “no violation of the Act was found or determined by the proposed settlement”). If the group settles, penalties may be directed toward third-party organizations; but court-ordered penalties, where the defendant admits liability, must be paid to the United States Treasury. *Id.*

¹⁴⁵ OFFICE OF THE CHIEF FIN. OFFICER, U.S. EPA, STRATEGIC PLAN 11 (2000) [hereinafter

those subject to regulation—in particular, on the propensity of individuals to try, in good faith, to comply with regulatory requirements. By one classical account, man is “solitary, poor, nasty [and] brutish.”¹⁴⁶ Such a being needs an external incentive—a deterrence model of enforcement—that imposes fear of punishment on the regulated entity.¹⁴⁷ But, according to a competing view, man is governed by reason to preserve the “life, health, liberty or possession of others.”¹⁴⁸ This altruistic being responds better to a cooperative enforcement scheme that facilitates compliance with what usually is a complex maze of regulatory requirements.¹⁴⁹

But what if Chester Bowles, a member of the 1941 wartime Office of Price Administration, was correct in his estimate that about two to three percent of the public are inherently dishonest (i.e., not law abiding), twenty percent will obey the law regardless of whether others do, and seventy-five percent will comply as long as they think that others are not taking advantage of them by violating the law without being caught and punished?¹⁵⁰ A one-dimensional system no longer fits all members of society. Under Bowles’s view of man, much stands to be gained by cooperation, but such cooperation must be backed up by “a *credible* deterrent”—one that will convince at least seventy-five percent of the population that violations result in enforcement actions.¹⁵¹ The question the EPA must therefore address is: what role should citizen participation play in a system that should both allow for the benefits that come from cooperative enforcement while maintaining a credible threat against those who refuse to cooperate?

A. Deterrence

The deterrence model views enforcement as a means of inducing potential violators to comply with regulatory requirements. It implicitly assumes that violations are harmful and, if possible, would have enforcers detect and punish every violation. In actuality, that goal is impracticable but also unnecessary, according to the deterrence model, because companies will guard against violating regulations as long as the probability of detection and the penalty for detected violations are sufficiently great.

2000 STRATEGIC PLAN] (identifying as “Goal 9” serving as “A Credible Deterrent to Pollution and Greater Compliance with the Law”), available at <http://www.epa.gov/ocfo/plan/2000strategicplan.pdf>.

¹⁴⁶ THOMAS HOBBS, *LEVIATHAN* 89 (C.B. Macpherson ed., 1985) (1651).

¹⁴⁷ See John T. Scholz, *Cooperation, Deterrence, and the Ecology of Regulatory Enforcement*, 18 *LAW & SOC’Y REV.* 179, 179 (1984) (defining deterrence as a “rule-oriented strategy [that] seeks to coerce compliance through the maximal detection and sanctioning of violations of legal rules”).

¹⁴⁸ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 265 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

¹⁴⁹ See Scholz, *supra* note 147, at 180 (defining cooperation as a strategy whose proponents “emphasize the difficulty of applying abstract rules to complex situations [on the belief that] attempts to fully enforce legal rules are unlikely to achieve desired ends”).

¹⁵⁰ CHESTER BOWLES, *PROMISES TO KEEP: MY YEARS IN PUBLIC LIFE 1941–1969*, at 25 (1971).

¹⁵¹ See *id.*

Justice Oliver Wendell Holmes's statement that legislation is needed to control "bad men" who would evade and ignore the law¹⁵² is the quintessential expression of the deterrence model and implicitly adopts Hobbes's view of human nature. Holmes's assignment of normative attributes may not make sense in a context where violators are most often corporate bureaucracies attempting to chart a course through a sea of regulations, driven by the winds of profit rather than the forces of evil.¹⁵³ Normative gloss aside, however, proponents of deterrence assert that by acting to maximize profits, businesses make self-interested decisions regarding compliance and that the legal system should impose penalties that make violation unprofitable.¹⁵⁴

Assuming that corporations do act to maximize profits, they will "comply where the costs of noncompliance outweigh the benefits of noncompliance."¹⁵⁵ The economic benefit of noncompliance equals the costs avoided by not purchasing pollution control equipment or implementing pollution control procedures. The costs of noncompliance include the costs of employing control measures once a violation is detected, plus any additional penalties imposed for being found in violation, multiplied by the probability that the violations will be detected.¹⁵⁶ The deterrence model aims to increase

¹⁵² Oliver Wendell Holmes, *The Path of the Law*, Address at the Boston University Law School (Jan. 8, 1897), in 110 HARV. L. REV. 991, 992 (1997) ("A man who cares nothing for an ethical rule which is believed and practiced by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can."). Justice Holmes made his remarks during his tenure as a justice on the Supreme Judicial Court of Massachusetts, when he delivered an address at the dedication of the new hall of the Boston University School of Law. *Id.* at 991.

¹⁵³ See Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1268-70 (1982) (arguing that morals are imperfect guides to making environmentally sound choices because "[n]either polluting nor failing to pollute is *a priori* the 'ethically' or 'morally' correct course of action"). Corporate directors may feel constrained by fiduciary duties to the corporation. As the Supreme Court of Michigan explained, "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end" *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

¹⁵⁴ See Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1186 (1998). Some commentators question whether corporations act to maximize shareholder value and hence profits. See also William Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264-76 (1992) (describing the conflict between the conception of the corporation as an entity designed to maximize share price and as a social entity allowed to make corporate expenditures to increase the general social welfare). Compare Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 278 (1999) ("[A] public corporation is a team of people who enter into a complex agreement to work together for their mutual gain. . . . They enter into this mutual agreement in an effort to reduce wasteful shirking and rent-seeking by relegating to the internal hierarchy the right to determine the division of duties and resources in this joint enterprise. They thus agree not to specific terms or outcomes . . . but to participation in a process of internal goal setting and dispute resolution."), with Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1921 (1996) (espousing the traditional view that corporate law in developed economies serves the functions of "maximizing the value of corporate enterprises to investors" or "minimizing the sum of the transaction and agency costs of contracting").

¹⁵⁵ Rechtschaffen, *supra* note 154, at 1186.

¹⁵⁶ *Id.* at 1186-87. Such "penalties" may include loss of goodwill that can affect the company's success in the marketplace. See *id.* at 1191. In doing the cost-benefit calculation when

penalties and the probability of detection such that the costs of noncompliance will outweigh the benefits, forcing profit-seeking companies to comply with the law. Thus, deterrence, unlike cooperation, counterbalances the benefits of noncompliance and creates a system of incentives that align businesses' self-interest with the public's desire that entities comply with statutes and regulations.

But this system is not flawless. The deterrence model's goal of perfect enforcement often leads to unreasonable outcomes. This may result from the fact that in a regulatory system devoted to the rule of law, regulations must be written that both put those subject to them on notice of what is prohibited and simultaneously allow the government to prevent behavior that would have significant deleterious impacts on public welfare. But regulations cannot be written with perfect precision.¹⁵⁷ Technically, they often outlaw behavior that, in the context in which it occurs, is benign or even beneficial. For example, Professors Bardach and Kagan relay a story told to them by the director of worker safety at an aluminum manufacturing company.¹⁵⁸ According to the safety director, an OSHA inspector ignored the highest priority risks of the plant and required the company to spend \$60,000 for rear exit doors to their lunchrooms, despite the fact that the rooms were protected by cinderblock walls, simply because a regulation required "alternative means of egress" in public spaces.¹⁵⁹

In addition, the sheer number and complexity of our system of regulations leads to significant deviations from optimality.¹⁶⁰ Rules that in isolation seem reasonable on their face may create burdens that overwhelm those trying to comply.¹⁶¹ In fact, such rules may actually conflict with one another.¹⁶² The unreasonableness of blind application of the rules and the burden imposed on industry by the voluminous set of regulations with which they are supposed to comply create situations in which immediate compliance is not in the public interest. Astute officials intuitively understand this and use prosecutorial discretion and the leverage of the threat of prosecution to induce regulated entities to engage in what the officials believe is optimal behavior, but which may permit violations of the rules.¹⁶³ The cooperative

deciding whether to comply with regulations, profit maximizing companies will discount the future cost of compliance and penalties because they occur in the future. See MARK SEIDENFELD, MICROECONOMIC PREDICATES OF LAW & ECONOMICS 81 (1996).

¹⁵⁷ See Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 70-71 (1983) (describing the necessary trade-off between "transparency," "accessibility," and "congruency").

¹⁵⁸ See EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 3-5 (1982).

¹⁵⁹ *Id.* at 4-5.

¹⁶⁰ See J.B. Ruhl et al., *Environmental Compliance: Another Integrity Crisis or Too Many Rules?*, 17 NAT. RESOURCES & ENV'T 24, 26-27 (2002) (suggesting that the large volume of regulations is the most important factor contributing to noncompliance with environmental regulations).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 610 (2000) (describing prosecutorial discretion as an "important mechanism for achieving an optimal level of enforcement and avoiding unproductive social costs

model of enforcement emerges from this attempt to pursue reasonable enforcement.

B. Cooperation

The cooperative model views the goals of enforcement as maximizing the benefits that flow from a regulatory program. It seeks to help companies comply to the extent that compliance is warranted under the circumstances that the company and society face.¹⁶⁴ Under the cooperative model, not all violations warrant punishment for two reasons. First, the promise of flexible enforcement can induce regulated entities to look harder for violations and to share information about violations and potential fixes more readily. Such cooperation lowers enforcement costs, allowing regulators to address more violations and to concentrate their resources on those that pose serious environmental threats.¹⁶⁵ Second, sometimes requiring strict compliance can impose social costs that exceed the costs of the pollution that results from a violation.¹⁶⁶ For example, a plant may malfunction, and the owner's only short-term solution to comply with regulations will be to shut down the plant. But shutting down the plant will throw workers out of jobs and hurt the local economy. In many such situations, companies need help figuring out what they can do to comply short of shutting down their plant and may need time to come into compliance in a manner that does not impose those social costs. In other cases, application to a particular plant of a regulation that is generally valid will not achieve the social objectives the regulation was meant to deliver, in which case compliance is counterproductive. The cooperative

associated with a regulatory regime"); Rechtschaffen, *supra* note 154, at 1189 (noting that even under a system that is nominally deterrence based, enforcers use discretion to impose either no sanction or minimal sanctions on most violators); *see also* WAYNE R. LAFAYE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 13.1(c), at 622 (2d ed. 1992) ("Even when it is clear that there exists evidence which is more than sufficient to show guilt beyond a reasonable doubt, the prosecutor might nonetheless decide not to charge a particular individual with a criminal offense.").

¹⁶⁴ *See* Rechtschaffen, *supra* note 154, at 1188; Albert J. Reiss, Jr., *Selecting Strategies of Social Control over Organizational Life*, in ENFORCING REGULATIONS 23–24 (Keith Hawkins & John M. Thomas eds., 1984) (contrasting deterrence and compliance (cooperative) based systems of social control). Thus, the EPA has labeled some of its cooperative enforcement efforts as "compliance incentive" and "compliance assistance" programs, both of which are alternatives to traditional enforcement approaches. *See* Markell, *supra* note 5, at 14–15.

¹⁶⁵ *Cf.* M.L. Friedland, *Introduction to SECURING COMPLIANCE: SEVEN CASE STUDIES* 3, 11–12, 17–18 (M.L. Friedland ed., 1990) (noting that the relative effectiveness of various enforcement models is still unknown); Rechtschaffen, *supra* note 154, at 1205–07 (arguing that evidence does not support claims that cooperation works better than deterrence, and that such arguments rest on fallacious suppositions about enforcement behavior). *See generally* Mark A. Cohen, *Information as a Policy Instrument in Protecting the Environment: What Have We Learned?*, 31 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,425 (2001) (discussing policy implications of environmental disclosure programs in lieu of regulation). There is no guarantee, however, that cooperative enforcement will increase environmental benefits because it is uncertain whether cooperation will actually induce a greater percentage of facilities to comply with regulations and because, by excusing some noncompliance, cooperation forfeits some pollution reduction from the violations that the agency addresses.

¹⁶⁶ *See* Rechtschaffen, *supra* note 154, at 1216 (noting that "most pollution results from otherwise productive, economically desirable activity that contributes to the material well-being of society").

model of enforcement takes a flexible approach that allows regulators to forgive violations and to work with plant owners to achieve the goals promised by the regulatory program.

Cooperative enforcement is predicated on the assumption that many companies do not choose to violate the law because they are base, but rather because they find themselves forced to violate regulations by circumstances. It emphasizes positive behavior and encourages "voluntary" compliance. Supporters of cooperation believe modern businesses are no longer slave to short-term cost calculations because corporations have evolved in several ways. First, some argue that today's businesses possess a sense of social responsibility to use their resources for the betterment of societies.¹⁶⁷ Under this theory, directors are "often concerned to do what is right, to be faithful to their identity as a law abiding citizen, and to sustain a self-concept of social responsibility."¹⁶⁸

Second, cooperation advocates insist that businesses are driven to comply voluntarily with environmental laws because of externalities such as market forces, potential damage to their reputation, and third-party liability claims.¹⁶⁹ Today's consumers are environmentally sensitive; or at the very least, their choices are influenced by environmentally concerned interest groups.¹⁷⁰ A corporation's reputation for environmental soundness promotes better relationships with governmental entities, interest groups, and the public at large; when consumers link a corporation's environmental practices with the quality of its products, compliance increases profits.¹⁷¹ Conversely, negative publicity resulting from or accompanying the violations has the potential to damage the corporation financially and may have adverse effects on the board of directors.¹⁷² The threat of court-ordered damage awards from tort litigation is significant.¹⁷³ Companies that depend on the trust of patrons face potentially even greater losses from the erosion of goodwill that can

¹⁶⁷ See *id.* at 1191–94 (discussing extent to which corporations act with a sense of social responsibility in the arena of environmental regulation).

¹⁶⁸ AYRES & BRAITHWAITE, *supra* note 10, at 22. Although the authors recognize that skeptics may disagree with a director's personal accounting of what motivates his or her own decisionmaking process, they note that a researcher cannot ignore such explanations when "there is evidence of economically irrational compliance with the law." *Id.* at 23. But see Allen, *supra* note 154, at 265 (noting that "[t]o law and economics scholars, who have been so influential in academic corporate law," the idea that corporations have moral obligations "is barely coherent and dangerously wrong").

¹⁶⁹ See Rechtschaffen, *supra* note 154, at 1194–96. For a discussion on the limits of liability as a substitute for direct regulation, see BARDACH & KAGAN, *supra* note 158, at 278–99.

¹⁷⁰ See Rechtschaffen, *supra* note 154, at 1195–96.

¹⁷¹ See *id.* at 1195.

¹⁷² See, e.g., *id.* For example, when faced with the National Highway Transportation Security Administration's threat of mandatory recalls of the Firestone Tires used on its Ford Explorers, Ford Motor Corporation "voluntarily" recalled over thirteen million tires on May 22, 2001. The decision cost the company nearly three billion dollars and was viewed as an effort to deflect attention away from Ford and onto Bridgestone/Firestone Inc. See Joann Muller, *Ford's Gamble, Will It Backfire?: Blaming Firestone Invites New Scrutiny Ford Can Ill Afford*, BUS. WK., June 4, 2001, at 40, 40; see also AYRES & BRAITHWAITE, *supra* note 10, at 22 (reporting on interviews with executives from large corporations who "viewed both their personal reputation in the community and their corporate reputation as priceless assets").

¹⁷³ See BARDACH & KAGAN, *supra* note 158, at 271.

accompany mere allegations of legal violations. The dual threat of tort liability and the loss of business from forfeited goodwill can topple even the giants of industry.¹⁷⁴ Advocates of the cooperation model contend that most businesses have strong incentives to act lawfully and suggest that agencies should view regulated parties as partners rather than adversaries.¹⁷⁵

Cooperation can decrease the costs of detection as well as the costs of compliance. When inspectors are flexible, rather than recalcitrant, regulated entities are more forthcoming with information. To some extent, the inspectors depend on the entity's cooperation; for example, Professors Ayres and Braithwaite explain that "[w]ith nursing home inspections in the United States and Australia, it is rare for an inspection to take place without one staff member or another giving the inspection team a tip-off of some value."¹⁷⁶ Although it is true that disgruntled employees may be seeking retribution, more often they are hoping that their willingness to cooperate will simply encourage correction of what they perceive to be a problem.¹⁷⁷

But cooperation too has its flaws. The cooperation model requires that regulators exercise broad discretion regarding enforcement, and there is no guarantee that the regulators will see the balance of interests in the same way as affected members of the public.¹⁷⁸ Moreover, entities that are regulated under the cooperation model understand that officials exercise discretion in how they apply the rules, and entities have an incentive to work the system, to "capture" the regulator, or to put a less malicious spin on their behavior, to convince regulators or judges that the public interest is best served by forgiving enforcement.¹⁷⁹ The scenario of cozy relationships between companies and regulators is in part what drives the need for public interest group involvement in the enforcement process.¹⁸⁰ In turn, once such groups partici-

¹⁷⁴ See, e.g., Peter Behr, *Progress in Mansville Case Seen: Judge Grants Delay to Seek Settlement of Asbestos Claims*, WASH. POST, Oct. 18, 1983, at E1 (reporting that the Mansville Corporation sought bankruptcy protection because "the mounting damage suits by asbestos workers" against the company for exposure to asbestos would bankrupt it); Mary Flood & Tom Fowler, *Andersen, or What's Left, to Learn Its Penalty Today; Large Fines Possible in Obstruction Case*, HOUSTON CHRON., Oct. 16, 2002, at 1B (reporting that former accounting firm Arthur Anderson was merely trying to get to the point where it could close its doors because of loss of business due to indictment for obstruction of justice in the Enron fiasco).

¹⁷⁵ For a discussion on why critics of the cooperation model believe these incentives will not create widespread compliance, see Rechtschaffen, *supra* note 154, at 1196-1201.

¹⁷⁶ AYRES & BRAITHWAITE, *supra* note 10, at 34.

¹⁷⁷ See, e.g., *id.*

¹⁷⁸ See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1570-71 (1992).

¹⁷⁹ See R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 198-99* (1983) (describing EPA regional offices as giving violators "time to receive and install requisite control equipment," allowing "firms in financial trouble to phase in expensive controls," and sometimes even allowing a firm to operate a facility in violation of permit requirements while it builds a replacement facility); *id.* at 207 (indicating that in enforcement decisions, courts have tended toward leniency, demanding that "regulators consider compliance costs and other mitigating factors"); cf. Rechtschaffen, *supra* note 154, at 1190 (noting that many proponents of cooperative regulation are "businesses who want to be treated more leniently [and] political leaders with antipathy toward environmental regulation").

¹⁸⁰ See Hodas, *supra* note 96, at 1624 (stating that the fear of agency capture was one of the motives for citizen suit provisions in environmental statutes).

pate entities feel the need to protect themselves against the actions of these groups, both in court and in the marketplace; regulated entities thus hesitate to release full information about their environmental compliance¹⁸¹—information on which the cooperation model depends.

C. *Balancing Deterrence and Cooperation*

Whereas scholars and agency officials once debated whether regulatory programs should be grounded in deterrence or cooperation, most recent dialogue favors a careful balance between the two models.¹⁸² Both deterrence and cooperation have been present in the EPA's enforcement program from its inception, but the EPA's delay in formally recognizing cooperation as an essential component of its enforcement program led to a tension between agency practices and the EPA's announced policy. Although the EPA had stated that its program was grounded in a legalistic, deterrence-based approach,¹⁸³ in practice, enforcement officials have often declined to penalize violators when they believed that the violation was not intentional and that the best means for curing the violation was through cooperation.¹⁸⁴ The abyss between the stated enforcement policy, based on deterrence, and actual practice, geared toward prosecutorial flexibility, led critics to claim that enforcement officials had been captured by industry.¹⁸⁵

Until recently, reconciliation of the two models was not part of the EPA's regulatory agenda. In the early 1970s, new statutory penalties reflected the theory that only enormous fines could deter violations by America's most successful corporations,¹⁸⁶ while regulators often settled for

181 See PRICE WATERHOUSE LLP, *THE VOLUNTARY ENVIRONMENTAL AUDIT SURVEY OF U.S. BUSINESS* 28 (1995) (reporting that in 1995, forty-five percent of companies that conducted environmental audits were hesitant to expand their audit programs because of fears that the information would be used against them in citizen suits or other enforcement actions); Rechtschaffen, *supra* note 154, at 1253 (noting that without legal protections against public disclosure of self audits, "many firms would forego audits because of fear that the information discovered will be used against them in enforcement actions or third-party lawsuits"); John S. Guttman, *Environmental Reviews Can Be Kept Confidential*, NAT'L L.J., June 20, 1994, at C12 (discussing legal doctrines companies can use to maintain the confidentiality of their internal compliance reviews so as to avoid exposure to liability); Marianne Lavelle, *Audit Privilege Mobilizes EPA*, *Business Bar*, NAT'L L.J., Aug. 8, 1994, at A1 (discussing EPA's attempt to halt passage of state laws granting a legal privilege to in-house audits of environmental compliance); cf. Robert Innes, *Violator Avoidance Activities and Self-Reporting in Optimal Law Enforcement*, 17 J.L. ECON. & ORG. 239, 252-54 (2001) (noting that the EPA could make its self-audit policy more attractive to industry by providing immunity against citizen suits for self-reported violations).

182 See, e.g., AYRES & BRAITHWAITE, *supra* note 10, at 21 ("Increasingly within both scholarly and regulatory communities there is a feeling that the regulatory agencies that do best at achieving their goals are those that strike some sort of sophisticated balance between the two models.").

183 See Rechtschaffen, *supra* note 154, at 1186.

184 See *id.* at 1189; see also BARDACH & KAGAN, *supra* note 158, at 37 (noting that enforcement officials often "act more like a 'persuader' or educator than a rule-bound bureaucrat").

185 See, e.g., BARDACH & KAGAN, *supra* note 158, at 44-45 (explaining Ralph Nader's "capture theory," which characterized enforcers as "weak-willed, lethargic 'captives' of the industries").

186 See Clean Air Act, 42 U.S.C. § 7608 (1988) (setting fines at \$25,000 for each day that a corporation was in violation of its permit and \$50,000 a day for repeat violators). To put this

good faith efforts to comply and avoided prosecution.¹⁸⁷ Despite its lenient practices, EPA's public posture remained centered on the deterrence model; for example, a call for greater deterrence supported Congress's approval of the Clean Air Act Amendments in 1990, which strengthened the EPA's power to assess administrative, civil, and criminal penalties.¹⁸⁸

But the EPA's stated policy has begun to change. Although the EPA failed to recognize the dichotomy of its deterrence-based procedures and cooperation-based practices in its Four-Year Strategic Plan for the 1990s,¹⁸⁹ Strategic Plan 2000 explicitly aims to improve both deterrence and cooperation.¹⁹⁰ Under its declaration of Goal 9, to provide "a credible deterrent to pollution and greater compliance with the law," the EPA lists two objectives: (1) to "improve the environment and protect public health . . . through a strong enforcement presence," and (2) to "promote the regulated community's compliance with environmental requirements through *voluntary compliance incentives and assistance programs*."¹⁹¹ Cooperative programs such as "compliance assistance" and "compliance incentives" have, to some extent, legitimized the EPA's informal dealings with businesses.¹⁹² Small businesses in particular have received special treatment. In 1996, Congress enacted the

penalty into perspective, General Motors's yearly operating revenues in 1970 were greater than the revenues of most countries, and its sales receipts exceeded the *combined* general revenues of New York, New Jersey, Pennsylvania, Ohio, Delaware, and the six New England states. See RICHARD J. BARBER, *THE AMERICAN CORPORATION: ITS POWER, ITS MONEY, ITS POLITICS* 19 (1970). General Motors was not unique, as at least 175 other corporations had annual sales of at least a billion dollars. *Id.*

¹⁸⁷ See SUSAN HUNTER & RICHARD W. WATERMAN, *ENFORCING THE LAW: THE CASE OF THE CLEAN WATER ACTS* 53–56 (1996) (explaining the EPA policy of preferring administrative resolution to litigation and stating that incentives disfavor seeking full penalties from violators); PETER C. YEAGER, *THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION* 280 (1991) (EPA reserved "formal sanctions [for] . . . those cases which [sic] indicated systemic (bad faith) non-compliance with the effluent limitations"); Rechtschaffen, *supra* note 154, at 1205–06 (arguing that "enforcement personnel . . . eschew formal, legalistic actions and rely heavily on informal negotiations . . . to achieve compliance"); cf. BARDACH & KAGAN, *supra* note 158, at 34 (arguing that "enforcement officials must be given broadly worded grants of discretion that will allow them . . . to relax the rules and tailor their enforcement procedures to the situation").

¹⁸⁸ Clean Air Act, 42 U.S.C. § 7604(a)(1) (2000). EPA's commitment to deterrence resounds in the words of its Assistant Administrator for Enforcement, James Strock, who warned regulated entities that "[f]or those who stumble off the road of responsible environmental citizenship, the message from EPA enforcement should be clear: The bear is hungry." James M. Strock, *EPA's Environmental Enforcement in the 1990s*, 20 *Env'tl. L. Rep.* (Env'tl L. Inst.) 10,327, 10,332 (Aug. 1990).

¹⁸⁹ See OFFICE OF ENFORCEMENT, U.S. EPA, NO. 21E-2001, *ENFORCEMENT FOUR-YEAR STRATEGIC PLAN: ENHANCED ENVIRONMENTAL ENFORCEMENT FOR THE 1990's* (1991), *available at* <http://www.epa.gov/clhtml/pubtitle.html>.

¹⁹⁰ See 2000 STRATEGIC PLAN, *supra* note 145.

¹⁹¹ *Id.* at 55–56 (emphasis added).

¹⁹² During fiscal year 2001, the EPA provided compliance assistance to more than 550,000 businesses; supported ten Web-based Compliance Assistance Centers to help small and medium-sized businesses, local governments, and federal facilities; and introduced the National Assistance Clearinghouse, a Web-based searchable reference guide for compliance assistance materials. See Press Release, *supra* note 9. Under its Audit and Small Business Policies, EPA offered waivers or significant reductions in penalties for facilities that detected, disclosed, and corrected environmental violations. See *id.*

Small Business Regulatory Enforcement Fairness Act,¹⁹³ requiring federal agencies like the EPA to develop programs that provide for the reduction and waiver of minor violations by small businesses when the violation is corrected within a reasonable period or is discovered in a compliance-assistance program.¹⁹⁴ As previously stated, the EPA's enforcement officers have been forgiving violations since the agency's inception; now they have formal authorization to do so.

Compliance assistance and incentive programs, however, have not been welcomed by all. Critics argue that even if forgiveness of first-time violations is reasonable, mandated reduction or waiver of penalties even in minor situations may be unwarranted,¹⁹⁵ for example, when offenders repeatedly violate regulatory requirements. This approach "often signals to the regulated community that it need not comply until enforcement begins."¹⁹⁶ Moreover, the programs complicate citizen involvement in the enforcement process; citizens must determine where they fit within the hybrid, how they can contribute to cooperative activities, and whether they can deter pollution in spite of EPA's tolerance of violations.

III. Citizen Participation in Enforcement

Citizen participation has been touted as an answer to the EPA's problems of detection, political and institutional constraints, and lack of resources,¹⁹⁷ but arguably there is a need for the EPA to maintain some control over the roles that citizens play. When asked to speak at a symposium entitled *Innovation in Environmental Law*, Stanford Law Professor Buzz Thompson declared that "the most pervasive, prominent, and continuing innovation in the modern environmental era has been the involvement of citizens in the enforcement of environmental laws."¹⁹⁸ Professor Thompson explained that while citizen involvement promotes democratic values, it also triggers concerns that citizen groups may misuse the information and power they obtain by such involvement.¹⁹⁹

¹⁹³ See Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (codified at 5 U.S.C. §§ 801-808, 15 U.S.C. § 657).

¹⁹⁴ See *id.* § 223.

¹⁹⁵ Rechtschaffen, *supra* note 154, at 1241-42; see also BARDACH & KAGAN, *supra* note 158, at 127 (arguing that the best regulators "are capable of being strict when necessary but also have the knowledge and skill to take calculated risks").

¹⁹⁶ Hodas, *supra* note 96, at 1616-17; cf. Rechtschaffen, *supra* note 154, at 1221-22 (noting the converse—that "deterrence reaffirms for the public that environment statutes are important and transgressions are to be taken very seriously").

¹⁹⁷ See Hodas, *supra* note 96, at 1620-21 (noting that citizen suits play an important role in large part due to EPA's lack of enforcement resources and the reticence of states to rigorously enforce environmental regulations); Thompson, *supra* note 88, at 187-88 ("Most analysts of citizen suits, both supporters and critics, have assumed that the principal purpose of citizen suits is to overcome obstacles to effective public enforcement, such as limited agency resources and the structural risk of agency underenforcement."); cf. Rechtschaffen, *supra* note 154, at 1232-34 (contending that citizen enforcers are neither interested nor particularly well suited to participating in cooperative enforcement schemes).

¹⁹⁸ Thompson, *supra* note 88, at 185.

¹⁹⁹ See, e.g., *id.* at 188.

In evaluating citizen participation in enforcement, it is helpful to identify the precise benefits that citizens can provide. Citizens can contribute to enforcement in at least two ways: first, by monitoring pollution and companies' compliance with regulations; second, by directing their private resources to prosecute violators.²⁰⁰

A. Monitoring

Citizen monitors are an integral part of environmental enforcement. They live and work in close proximity to potential sources of pollution and therefore often are the best sources of information and the most able witnesses of environmental violations.²⁰¹ Approximately 12,000 nonprofit monitoring organizations and "keepers"²⁰² have developed programs and strategies for addressing environmental concerns.²⁰³ The groups, ranging in size anywhere from a few individuals to a few thousand volunteers, are comprised most often of lay people with no prior experience in environmental monitoring or data collection; nonetheless, they patrol local environments for potential violations and report their findings to local agencies or the EPA.²⁰⁴

The EPA "encourages the public to 'keep their eyes and ears open' and to contact the appropriate . . . authorities whenever they notice a potential pollution problem" because the agency's enforcement program benefits from citizen monitoring in several ways.²⁰⁵ First, monitoring groups have historically focused on waterways, where detection of violations is most difficult.²⁰⁶ Rather than relying on enforcement officers to find water pollution in a hit-or-miss fashion, the EPA depends on citizen monitors who are distinctly familiar with the area and who are more likely to detect changes in water quality or marine ecosystems.²⁰⁷ Second, not-for-profit monitoring groups do not face political and bureaucratic constraints that can stifle innovation. Although the government subsidizes citizen monitors directly through grants or indirectly through tax deductions for charitable contributions, the groups rely heavily on private funding, which in some instances encourages them to use

²⁰⁰ See *id.* at 192 (identifying three roles for the citizen enforcer: prosecutor, monitor, and informant).

²⁰¹ See Van Heuvelen & Breggin, *supra* note 3, at 574.

²⁰² Thompson, *supra* note 88, at 220–21 ("Borrowing the concept of a 'riverkeeper' from English private waterways, the journalist Robert Boyle in 1969 proposed that the Hudson River needed a riverkeeper to protect it. . . . [During the 1990s, riverkeepers grew into] a loose confederation of approximately three dozen keeper programs in almost twenty states." (citations omitted)).

²⁰³ *Id.* at 218. For a brief history of citizen monitoring, see Virginia Lee, *Volunteer Monitoring: A Brief History*, VOLUNTEER MONITOR (Volunteer Monitor, San Francisco, Cal.), Spring 1994, at 29, <http://www.epa.gov/owow/monitoring/volunteer/newsletter/volmon06no1.pdf>.

²⁰⁴ Thompson, *supra* note 88, at 218.

²⁰⁵ OFFICE OF ENFORCEMENT, U.S. EPA, ENVIRONMENTAL ENFORCEMENT: A CITIZEN'S GUIDE (1990), available at <http://www.epa.gov/region4/air/enforce/citizenf.htm>.

²⁰⁶ See, e.g., Thompson, *supra* note 88, at 224 ("Formal inspections are a relatively inefficient method of monitoring miles of waterways; if an inspector is not in the right place at the right time, violations can easily go undetected.").

²⁰⁷ See *id.* at 217–26 (discussing role of citizen monitors and their ability to develop strategies appropriate to their locale).

innovative techniques for monitoring pollution.²⁰⁸ For example, the Cook Inlet Keeper has developed an innovative monitoring system and compiled an extensive database that tracks environmental hazards, and the group raises revenue by charging for access to this database.²⁰⁹ The EPA profits from the additional monitoring data made available as a result of these innovations. Finally, citizen monitoring provides the EPA with resources it desperately lacks: manpower and money.²¹⁰ Monitors often work "in tandem with the government," sharing technical and organizational information.²¹¹ The groups educate the public through programs, hotlines, and various publications; they encourage the average citizen to get involved.²¹²

Citizen groups that merely monitor pollution fit easily within a hybrid model of deterrence and cooperation; their involvement in the enforcement program results in few tradeoffs or concerns. Frequently, citizen monitors work closely with businesses and government agencies and usually defer to the regulators' prosecutorial discretion.²¹³ Instead of filing citizen suits, monitoring groups and keepers most often provide public agencies with information and try to convince federal enforcers to prosecute violators.²¹⁴

From this perspective, one can understand why few people criticize the role that citizens play as monitors in the enforcement program.²¹⁵ But while scholars like Professor Thompson praise citizen monitoring because it "dull[s] the distinction between the private and public realms,"²¹⁶ one might argue against the program for the very same reason. Citizen groups express concerns about pollution that may reflect their idiosyncratic interests rather than the preferences of the broader polity to which state and federal regulators answer.

²⁰⁸ See *id.* at 194.

²⁰⁹ See Cook Inlet Keeper, Watershed Network, at <http://www.inletkeeper.org/watershednetw.htm> (last visited Nov. 11, 2004).

²¹⁰ See Thompson, *supra* note 88, at 223 ("Direct grants, if carefully tailored to provide the necessary infrastructure needed to attract more volunteer monitors, can provide a similar leveraging of the government's limited resources.").

²¹¹ See *id.* at 224–25.

²¹² See *id.* at 225.

²¹³ See *id.* at 222 (noting that only twenty-three percent of citizen monitoring groups collected data specifically for enforcement purposes).

²¹⁴ See, e.g., *United States v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380 (8th Cir. 1992). The prosecution in *Goodner* resulted from the report of a citizen, who witnessed two men dumping toxic-smelling waste into a ravine located on a farm near an aircraft refurbishing company. See *id.* at 383. The citizen reported the violation to the EPA despite the farm owner's reassurances that there was no cause for concern. See *id.* EPA investigators discovered that the owner had dumped approximately twenty-five tons of waste from removers and old paint and filed suit under CERCLA and RCRA. See *id.* at 382–83. For a discussion of the circumstances of this case, see also Van Heuvelen & Breggin, *supra* note 3, at 575.

²¹⁵ See Thompson, *supra* note 88, at 226 ("The most common criticism is directed not at citizen monitoring but at the use of the monitoring data to either file citizen suits or criticize governmental agencies in the media for ineffective enforcement.").

²¹⁶ *Id.* at 225.

B. Prosecution

Although legislators authorizing the citizen suit provision under the 1970 Clean Air Act believed they were merely extending an established history of private compensation and *qui tam* actions,²¹⁷ controversy has surrounded the power delegated to private citizens acting under environmental citizen suit provisions. Regulated entities cringe at the prospect of dual enforcement²¹⁸ and worry that private enforcers will interfere with established relationships and understandings.²¹⁹ For example, one of the major impediments to the efforts of states and EPA to induce companies to implement self-audit programs is the fear on the part of the companies that some overly zealous interest group will use the information they provide to sue them.²²⁰ Other members of the regulatory community share “widespread skepticism about both the motivations of private enforcers and their legitimacy as surrogates for government.”²²¹ Critics fear that private enforcers will replace the government’s “leniency error,” its failure to pursue actions that would produce public benefits, with the “zealousness error,” which is created when pursuit of individual benefits imposes public costs.²²² Even the federal courts have expressed concern that enforcement of the law is the proper province of the executive branch and not the citizenry generally.²²³

But citizen suits are not necessarily maniacal exercises of power. Indeed, one of the benefits produced by citizen suits, namely, increased competition for enforcement, has far surpassed the effects originally envisioned.²²⁴ At the federal level, “the growth of private enforcement is acting as a com-

217 *Id.* at 196. Citizen suits were not mere reproductions of existing private right actions. They expanded the existing notions of injury and the legitimate interest of private citizens and extended the accepted role of private plaintiffs. *Id.* at 197.

218 See ENVTL. LAW INST., *supra* note 91, at ix.

219 Boyer & Meidinger, *supra* note 47, at 959.

220 A 1995 study of industry sectors with more than 100 employees and with annual sales exceeding \$100 million revealed that, of the companies that conducted environmental audits, forty-five percent were hesitant to expand their auditing program because they feared their self-policing would be used against them in citizen suits and enforcement actions. See PRICE WATERHOUSE LLP, *supra* note 181, at 28; see also Elizabeth Glass Geltman & Carey Ann Matthews, *Environmental Democracy*, 22 J. CORP. L. 395, 398 (1997) (“Government and business are also aware, however, that increased self-policing increases vulnerability to lawsuits.”).

221 See Boyer & Meidinger, *supra* note 47, at 959.

222 Thompson, *supra* note 88, at 201.

223 Thus, in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), Justice Scalia opined: To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an “individual right” vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to “take Care that the Laws be faithfully executed.”

Id. at 577 (citation omitted); see also *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000) (explicitly holding in abeyance the question of whether congressional creation of *qui tam* actions violates the president’s power under Article II’s Appointment or Take Care Clauses).

224 Thompson, *supra* note 88, at 198–99. Professor Thompson qualifies the benefit of competition in the regulatory system by admitting that competition in public enforcement “is only loosely analogous to competition in private markets” because government enforcers do not have to compete to survive. *Id.* at 199.

petitive spur to government enforcers, prodding them to improve their management tools for measuring, securing, and overseeing compliance.”²²⁵ Additionally, competition from private enforcers may have been the impetus for the EPA’s innovative settlements and its reconciliation of policies and practices.²²⁶

Citizen suits can also reinforce democratic values in our system of environmental regulation. Giving citizens a voice at the enforcement stage of the regulatory process can play an important role in keeping regulators publicly accountable.²²⁷ Although the Administrative Procedure Act affords citizens the opportunity to affect the content of regulation,²²⁸ the actual impact of regulation on the behavior of polluters depends on how those regulations are applied. An agency could alter the meaning of a regulation simply by construing it in a manner contrary to the understanding of the citizens who may have been involved in and even supported its promulgation,²²⁹ and “[m]any interpretive issues arise only at the enforcement stage of a statute’s implementation.”²³⁰ Without the private right to file suit, agencies could simply elide the interpretive issue by refusing to attempt to enforce the regulation in a context that would raise the issue.

IV. Potential Solutions

Ultimately, governmental regulators are charged with the task of creating enforcement mechanisms that will capture the benefits of citizen participation without incurring the potential detriments.²³¹ An effective mechanism will allow citizen participation to continue to prod the government to enforce regulations sufficiently to deter deleterious violations while avoiding the pitfalls of inflexibility and conflicts of interest that can plague such participation. The remainder of this Article describes three solutions designed to ease the tension between deterrence and cooperation and to resolve the discrepancies between government-initiated and citizen-initiated enforcement.

The first potential solution, “tripartism,”²³² proposes that self-selected public interest groups should be included in the regulatory process on equal

²²⁵ Boyer & Meidinger, *supra* note 47, at 957.

²²⁶ SEPs are examples of the potential for innovation under competitive enforcement. Thompson, *supra* note 88, at 207; *see also* Boyer & Meidinger, *supra* note 47, at 957 (“[T]here is no doubt that private enforcement helped to keep compliance issues high on the agendas of top agency officials . . .”).

²²⁷ *See, e.g.*, Thompson, *supra* note 88, at 198–99.

²²⁸ *See* Administrative Procedure Act, 5 U.S.C. § 553 (2000).

²²⁹ For example, one problem that plagues negotiated rulemaking is that supporters of the negotiated rule, which the agency then promulgates, challenge the agency’s later interpretation and application of the rule. *See* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1324–25 (1997) (giving examples in which groups represented in negotiation of rules later challenged the rules claiming that the adopted rule deviated from the negotiated consensus); Seidenfeld, *supra* note 2, at 453.

²³⁰ Thompson, *supra* note 88, at 209.

²³¹ *See* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 211–28 (1997) (describing some of the problems caused by unrestricted participation in the administrative process).

²³² The term tripartism was coined by Ian Ayres and John Braithwaite, who built on game

footing with the agency. The second solution, "corporatism," gives agencies the power to handpick interest groups to represent the public in enforcement negotiations.²³³ For reasons discussed below, both of these solutions, tripartism and corporatism, are of limited effect and introduce new problems into current mechanisms for enforcement. The final solution, which we label "deliberative participation," is perhaps the most promising; it creates a limited empowerment of citizen enforcers within the existing framework of judicial review of agency action.²³⁴

A. Tripartism

1. *The Problem of Strategic Behavior Between Regulators and Regulated Entities*

Tripartism calls for the empowerment of private citizens so that they can participate in regulatory decisionmaking on the same footing as regulators and regulated entities. This approach to citizen participation was developed to ensure against capture and corruption of agencies charged with implementing regulatory programs.²³⁵

According to standard accounts of evolutionary game theory,²³⁶ the socially optimal enforcement strategy is tit-for-tat ("TFT"), a strategy in which the agency cooperates with regulated entities who are cooperating but shifts to deterrence if the entity attempts to exploit the agency's cooperative nature.²³⁷ Unlike the traditional debate about the efficacy of cooperation versus deterrence, the teachings of evolutionary game theory do not depend on any altruistic assumptions about human behavior; rather, it is grounded in the theory of rational choice; yet, the theory still leads to the conclusion that mutual cooperation not only is socially optimal, but that it results from the

theoretic models of cooperative enforcement developed by John Scholz. See AYRES & BRAITHWAITE, *supra* note 10, at 57–59.

²³³ See *infra* notes 257–58 and accompanying text.

²³⁴ See *infra* Part IV.C.1.

²³⁵ Tripartism was the response of Ian Ayres and John Braithwaite to John Scholz's applications of evolutionary game theory to regulatory programs generally, and enforcement in particular. See AYRES & BRAITHWAITE, *supra* note 10, at 57–59. See generally Scholz, *supra* note 147; John T. Scholz, *Cooperative Regulatory Enforcement and the Politics of Administrative Effectiveness*, 85 AM. POL. SCI. REV. 115 (1991) [hereinafter Scholz, *Cooperative Regulatory Enforcement*] (applying game theory to the problem of cooperative enforcement strategies and the effect of policy beneficiaries on enforcement); John T. Scholz, *Voluntary Compliance and Regulatory Policy*, 6 LAW & POL'Y 385 (1984) (discussing "Tit for Tat" enforcement strategy based on game theory).

²³⁶ For further discussion on the origin and details of evolutionary game theory, see Robert Axelrod, *Effective Choice in the Prisoner's Dilemma*, 24 J. CONFLICT RESOL. 3 (1980); Erica Beecher-Monas, *Enron, Epistemology, and Accountability: Regulating in a Global Economy*, 37 IND. L. REV. 141, 157–65 (2003).

²³⁷ See Scholz, *supra* note 147, at 189–93 ("[T]he agency can elicit cooperation in the continued 'game' by combining cooperation and deterrence in a simple TFT strategy: use deterrence against all firms that evaded in the last round and cooperate with all other firms."); see also AYRES & BRAITHWAITE, *supra* note 10, at 22 ("TFT is an unusually robust policy idea because radically divergent accounts of regulation converge of the efficacy of TFT.").

strategy that best serves the interests of both the agency and the regulated entity.²³⁸

Proponents of tripartism examined the application of game theory to regulatory enforcement and asked a seemingly simple question: "How do we secure the advantages of the evolution of cooperation while averting the evolution of capture and corruption?"²³⁹ As noted earlier, TFT requires a cooperation-first mentality. Optimal benefits are dependent on the cooperation of each of the two parties; if either defects, the benefit is lost. Thus, maximization of the benefits of TFT strategies is most likely when the parties know and trust each other. But this familiarity invites opportunity for capture and corruption.²⁴⁰ The problem is not easily solved. Without familiarity, TFT fails because it is based on the "perceived probability in any given round that there will be another round."²⁴¹

Tripartism purports to find an answer to the capture-corruption conundrum in empowerment of public interest groups.²⁴² Proponents of tripartism contend that when such groups enter the game on equal footing with the other players, the groups have the potential to prevent capture and corruption.²⁴³ Empowering stakeholders to participate on an equal footing with regulators and regulated entities demands mechanisms for citizen participation that might appear similar to existing mechanisms but that go significantly beyond opportunities for participation under current law. First, tripartism grants public interest groups access to all of the information available to the agency, provides them with a seat at the negotiating table, and authorizes them to prosecute regulated entities as if they were the regulator.²⁴⁴ Thus, whether the agency proceeds by administrative action or civil suit, affected public interest groups would have the ability to veto any settlement the agency reaches with the regulated entity. Moreover, if an agency decided

²³⁸ See Scholz, *supra* note 147, at 208. Several real world factors may inhibit the benefits of cooperation-first. If regulated entities are relatively diverse, or if they fail to recognize the advantages of cooperation, for example, they will shatter the beneficial outcome achieved only through mutual cooperation. *Id.* at 219. In other words, TFT can easily spiral down into mutual noncooperation if either the regulator or company deviates from cooperation. Some recent work on evolutionary game theory suggests that variations on the simple TFT strategy may promise benefits similar in magnitude to those that follow from TFT, but which are more stable in the real world, where defections by either party can occur inadvertently or because one player misreads the implications of the other player's actions. See ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, COOPERATION AND WELFARE* 110-15 (1986); Karl Sigmund, *Automata for Repeated Games*, in *EVOLUTION AND PROGRESS IN DEMOCRACIES* 335, 340-42 (Johann Gotschl ed., 2001) (proposing "contrite tit-for-tat" as a potentially optimal strategy); M.A. Nowak et al., *The Arithmetics of Mutual Help*, *SCI. AM.*, June 1995, at 76, 79-80 (proposing a strategy called "Pavlov" for overcoming the potential downward spiral of repeated prisoners dilemma to perpetual retaliation).

²³⁹ AYRES & BRAITHWAITE, *supra* note 10, at 56.

²⁴⁰ See *id.*

²⁴¹ See Scholz, *supra* note 147, at 189.

²⁴² The authors purposefully avoid qualification of what types of organizations qualify as PIGs, but they suggest that political elections will ensure that the groups include representatives of both public and private interests. See AYRES & BRAITHWAITE, *supra* note 10, at 58.

²⁴³ See *id.* at 56, 71-75 (noting that the addition of a third party increases the costs of capture).

²⁴⁴ This is the same power granted under *qui tam* provisions. See *id.* at 166 n.4.

that strict regulatory compliance was inappropriate with respect to a particular violation and therefore pursued a cooperative approach to enforcement, a public interest group could sue to demand strict compliance, and the agency would not be free to stop such a suit via its own enforcement action. Second, the public interest group is a “contestable guardian” in a republican system.²⁴⁵ To create contestability, tripartism envisions a two-tiered process with at least two layers of competition. The most appropriate interest group is first selected to represent public or private interests either through the vote of a “peak council of [public interest groups]” or by popular election.²⁴⁶ The chosen interest group then elects a representative from within its organization to take part in the negotiations.²⁴⁷ In this two-tiered system, not only must public interest groups vie for the privilege of acting as the third party in negotiations, but their leaders must also compete within their own groups for election as chief negotiator. Through equal access and direct, contestable participation, tripartism theorizes that interest groups restore the potential for optimal benefits.

In short, implementation of tripartism in the enforcement context would require small but significant modifications to the law governing citizen enforcement. Empowering citizens requires that interest groups not only be able to bring suits, but that the government not be able to usurp this prerogative and then proceed to pursue an agenda different from that of the interest group plaintiff. Thus, full empowerment suggests that citizen suit provisions would have to be changed to allow interest groups to maintain such suits even when the government was diligently prosecuting violations on its own or when the government had already agreed to settle the matter. In addition, tripartism would require legislative change to set up democratic mechanisms both between and within interest groups that would allow classes of affected citizens to choose their representative at the enforcement table.

2. Critiques of Tripartism

Tripartism is premised on each class of stakeholders that share a common interest in a regulatory system being able to select a representative in the regulatory process. There is, however, no feasible way to enable each class of stakeholders in a complex and constantly evolving regulatory system to select a representative who will effectively represent its interests. Before tripartism could operate, the government would have to set up some mechanism for identifying members of each class of stakeholders and the interest groups that belong in that class. Proponents of tripartism do not provide any criteria by which government could make such choices. Moreover, to be true

²⁴⁵ *Id.* at 57–58 (suggesting that PIGs should rely on a democratic system that enables members to remove captured leaders and that PIGs should compete for appointment to the negotiating table); *see also* Seidenfeld, *supra* note 2, at 492–96 (discussing election of stakeholder representatives as a means of limiting empowerment).

²⁴⁶ AYRES & BRAITHWAITE, *supra* note 10, at 58, 166 n.5 (explaining that “political parties would be expected to include in their election platforms policies about which PIGs or PIG peak councils would be privileged as representatives of labor, environmental, and consumer groups, and how and under what circumstances they would be privileged”).

²⁴⁷ *See id.* at 58.

to tripartism, the government could not simply invite a subset of affected interests; all of the interests must be represented at the table. In addition, it would not be sufficient to establish classes of stakeholders at some initial point in time and not revisit whether that classification scheme makes sense as stakeholders' interests change in response to external circumstances as well as the evolution of the regulatory system itself.²⁴⁸

To illustrate the problems created by the requirement that all interests be represented, consider the issue of maintaining old growth forest to protect the endangered spotted owl in the Northwest United States. It may not be sufficient to have one interest group represent all environmentalists. Some environmentalists might have an instrumental objection to destruction of the habitat because they use the forests at issue. Others may have a moral objection. Still others may be instrumentalists who support species preservation because of the uncertainty of the future cost of having species go extinct. All of these environmentalists have different interests at stake; depending on the precise contours of any regulatory scheme ultimately adopted, they may agree or disagree about the desirability of that scheme. Yet tripartism provides no clue about whether these environmentalists should be lumped together or entitled to separate representation, or how this decision should be made.²⁴⁹

Furthermore, tripartism is grounded on a recognition that the present system's emphasis on "backroom" settlements fails to assure the public that negotiations are conducted at arms' length, but tripartism fails adequately to answer the fear that citizen empowerment could interfere with the relationship of regulatory agencies and regulated entities necessary to realize the benefits of cooperative enforcement. Cooperative enforcement requires that the parties develop an ongoing relationship that allows them to build trust in one another. But interest groups often lack the means and the incentives to maintain such a relationship.

The paradigmatic environmental group—usually a local organization whose members provide both the financing and control of the group and materially benefit from pollution reduction—usually will not have the resources and technical expertise to meaningfully monitor compliance.²⁵⁰ They are best at identifying a particular local environmental problem, such as a noticeable pollution discharge, and complaining about it until the effects are eliminated.

²⁴⁸ One could limit representation to a subset of stakeholders, and decide on makeup of the appropriate stakeholder class at the outset, and not allow representation to change to reflect the evolution of the regulatory system. Such an approach, however, would correspond to what I have labeled corporatism, which I discuss below. See *infra* Part V.B.

²⁴⁹ The issue is similar to that raised in labor law, when disputes arise about the appropriate contours of a bargaining unit. See Rafael Gely, *A Tale of Three Statutes . . . (and One Industry): A Case Study on Competitive Effects of Regulation*, 80 OR. L. REV. 947, 960 (2001) (describing the National Labor Relations Board's discretion in choosing appropriate bargaining units authorized to engage in collective bargaining with employers). In the labor context the issue is simpler because the government has only established one interest—organized labor—to join in the regulatory scheme, and it has not reassessed who should be allowed at the table to negotiate collective bargaining agreements with employers since passing the major labor statutes in the 1930s and 40s.

²⁵⁰ Rechtschaffen, *supra* note 154, at 1233–34.

But they are not very effective at monitoring steps the polluter takes to ensure against future discharges.

Even though members of such local groups directly benefit from pollution reduction and hence stand to gain in the long run from implementation of a cooperative approach to enforcement, each individual local group may not have the incentive to develop the requisite relationship with polluters. Although environmental protections might be maximized by increased use of cooperative enforcement generally, incentives for individual interest groups may be to seek maximal penalties in their individual cases. Essentially, each plaintiff will try to free-ride and maximize deterrence of pollution that affects them by threatening to sue for harsh penalties in their case even if that undermines the benefits of cooperation in similar cases to which they are not parties.²⁵¹ Cooperation may represent the socially preferable long-run equilibrium, and hence, over time, parties may begin to understand the potential for optimal benefits under a cooperative system. But there is no guarantee that this will occur, and short-run incentives may drive individual interest groups away from cooperation. Accordingly, there is little reason to agree with proponents of empowerment who contend that interest groups will learn to trust government regulatory enforcement, which will alleviate concerns that these groups will abuse their added enforcement powers.²⁵²

The internal dynamics of central staff and mass membership groups may exacerbate the tendency of such groups to avoid cooperative enforcement even when cooperation promises benefits to group members. Tripartism depends on the ability of public interest groups to self-select appropriate representatives and on the willingness of those representatives to cooperate. Tripartism assumes that interest groups will represent the viewpoints of their members; but in today's public interest groups, leaders seldom reflect the political ideologies of individual members. Instead, the most direct goal of the "central staff" of such groups is collection of fees and costs, which they can derive from litigation but not from a continued monitoring presence at a facility.²⁵³ "Mass membership" groups are funded by members who rarely participate in group activities.²⁵⁴ Their market for membership creates per-

²⁵¹ See Scholz, *Cooperative Regulatory Enforcement*, *supra* note 235, at 124. Even companies other than the defendant in the particular citizen suit may support strict compliance in that suit as a way of gaining a competitive advantage. See BARDACH & KAGAN, *supra* note 158, at 18 ("Antibusiness social groups are often joined in pushing for more protective regulation by distinctly 'probusiness' groups and, in fact, by businesses. Regulation usually affects competitors unevenly, imposing relatively higher costs on some than on others and creating advantages for low-compliance-costs firms.").

²⁵² See, e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997) (discussing how sustained interaction necessitated by collaborative governance helps participants build trust rather than developing adversarial relationships). See generally AYRES & BRAITHWAITE, *supra* note 10, at 71-73, 82-84 (discussing how empowerment of PIGs raises the "costs of capture"; arguing that PIGs will not demand a higher standard of compliance with regulations than that required by law because they will be counterbalanced by industry demands for a lower standard).

²⁵³ Cf. Seidenfeld, *supra* note 2, at 474 (asserting that national interest groups do not participate in EPA's XL projects because they cannot generate revenue or notoriety by doing so).

²⁵⁴ See, e.g., *id.* at 430-33.

verse incentives for leaders to take extreme or idiosyncratic positions.²⁵⁵ Potential contributors are often ill-informed about a group's activities and may be swayed by publicity that sets one group apart from the others. Zealous activism is rewarded by individuals who seek to identify with a cause joining the notorious group. Market forces, therefore, create a disincentive for mass membership groups to cooperate in the manner predicted by evolutionary game theory. This does not mean that a regulatory program dependent on group cooperation is entirely futile; it merely indicates that problems are likely to arise if public interest groups are left to self-select their representatives.²⁵⁶

B. Collaborative Governance and the Corporatist Model

1. Giving Preselected Groups a Permanent Place in the Regulatory Scheme

The corporatist model recognizes that "empowerment may succeed in reducing the costs of adversarialism and improving the flexibility of regulation."²⁵⁷ Under this model, however, rather than making the seat at the negotiating table contestable, the government chooses the interest groups that will represent preselected stakeholder interests that the government has decided deserve a permanent place in the monitoring and enforcement scheme. Corporatism still allows for the leadership of that group—or, more relevantly, the selection of the individual who will represent that group in the enforcement process—to be contested.

The corporatist model greatly increases the opportunities for cooperative enforcement compared with those afforded by tripartism. Corporatism overcomes the lack of incentives and expertise that are likely to plague tripartism. Because the place at the table for a selected group is relatively permanent, the group can derive reputational benefits that allow it to attract members and grants from benefactors looking to influence enforcement decisions. Thus, groups have a substantial incentive to be chosen and to maintain their place in the bargaining process. Moreover, the relative permanence of

²⁵⁵ See *id.* at 432 (explaining that competition may "exacerbate rather than mollify" extremist tendencies (citations omitted)).

²⁵⁶ See *id.* at 427–28 (arguing that group leaders who interact with agencies on an ongoing, long-term basis may personally benefit from cooperation with regulators).

²⁵⁷ *Id.* at 445. "Corporatism" has been defined as follows:

[A] system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, noncompetitive, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports.

Philippe C. Schmitter, *Still the Century of Corporatism?*, in *TRENDS TOWARD CORPORATIST INTERMEDIATION* 7, 13 & n.22 (Philippe C. Schmitter & Gerhard Lehmbruch eds., 1979); see also AYRES & BRAITHWAITE, *supra* note 10, at 166 n.5 (describing Schmitter's proposal for a voucher system where "[a]ll citizens would get vouchers, representing a promise of funds to be paid out of consolidated revenue to PIGs. The state could then be considered to privilege the PIGs who received [the] most vouchers.").

a group's presence facilitates development of the expertise necessary to participate in cooperative enforcement.

The opportunity for cooperation is strengthened when regulators can exclude extremist groups who are willing to act unreasonably to further their causes.²⁵⁸ And because only preselected groups get to participate in the bargaining process, extreme factions cannot gain entrance by splintering from mainstream groups and asserting that they represent different interests that must also be allowed to participate in the process. Thus, industry has less to fear from revealing information about violations to the agency and participating interest groups because it has some assurance that these groups will not unreasonably try to shut down plants by filing enforcement actions. For example, had corporatism applied in the Exxon *Valdez* incident, EPA officials might have called for a representative of all Alaskan fishermen living and working in Prince William Sound to join government officials and Exxon executives in settlement negotiations. The representative, elected through voting mechanisms internal to the industry, would have been granted equal access to information and would have entered the process with full participatory rights. Subsequently, all fishermen would have been bound by the terms of the agreement. Such a plan might have focused the settlement more on long-term restoration of the ecosystem and less on saving individual photogenic animals.

2. Critiques of the Corporatist Approach

Although stakeholder involvement may decrease costs and provide the parties with creative solutions, the corporatist model is imperfect.²⁵⁹ First, because agencies control the selection of interest groups, they have the ability to ignore valid concerns and to reward parties who are most likely to agree with the government's position.²⁶⁰ Just as the cooperative model raises concerns about agency capture, the corporatist model creates an opportunity for "reverse capture," a scenario characterized by an agency offering seats at the enforcement table to third parties sympathetic to its cause. Second, because the right to participate becomes a valuable endowment groups and individuals within groups will compete for that privilege and may devote resources to obtaining or maintaining themselves in the privileged position rather than to representing their constituencies to the best of their abilities.²⁶¹

²⁵⁸ Cf. Seidenfeld, *supra* note 2, at 445–46.

²⁵⁹ Stakeholders include representatives of those directly affected by the regulated entity's violations.

²⁶⁰ See Seidenfeld, *supra* note 2, at 488 ("Allowing agencies to exclude groups from the regulatory process . . . would be problematic because it might allow agencies to exclude those groups most likely to oppose a sweetheart regulatory deal . . .").

²⁶¹ The guaranteed place for the group in the enforcement process removes constraints that competition among groups would place on group leaders' abilities to act in their self-interest at the expense of group members. Cf. Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1437, 1466–67 (1992) (making a similar point that lack of competition in product markets gives corporate managers more leeway to self-deal). The corporatist model is commonly used in Europe for structuring environmental protection. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 188–89 (2001). In the United States, regulation of labor relations

Finally, to be truly effective, the corporatist model must exclude extremist groups from the *entire* settlement process, including judicial review. To the extent that regulatory decisions affect fundamental interests of members of these groups, however, our political system may be unwilling to exclude them from the enforcement process.²⁶² Hence, although the corporatist model answers the threat of extremism raised by tripartism, it is unlikely to serve as a general model of citizen participation in the enforcement process.

C. *Deliberative Participation*

1. *Operational Mechanisms for Deliberative Participation in Enforcement*

Deliberative participation is predicated on the view that citizen groups should be empowered to communicate their views to the agency and force the agency to explain and justify its decisions in light of those communications. By doing so, information, concerns, and values held by the public can influence prosecutorial decisions without granting public interest groups power to prevent an agency from adopting reasonable means to encourage regulatory compliance. One must recognize at the outset that this limited empowerment is very different from that envisioned under tripartism because it would place ultimate control over enforcement in the agency and thereby constrain interest groups from abusing their power or diverting the power of the government to further their idiosyncratic ends. For this reason, the propensity for interest groups to refuse to participate in an ongoing cooperative endeavor is not of great importance. Interest groups can play their traditional role as one-shot objectors to governmental action, but their objections will not hold sway unless they can convince either the agency or the court that their position has merits.

The precise mechanism for implementing deliberative participation in the enforcement context depends on the type of action the agency initially takes in response to a violation. Generally, the deliberative participation ap-

comes closest to a corporatist system, with unions being given a permanent seat at the bargaining table. Consistent with my observations that the corporatist structure tends to encourage interest group leaders to pursue personal objectives, several scholars have noted the tension between labor leaders' role of representing workers and their incentives to maintain their own power. See Daniel J. Gifford, *Redefining the Antitrust Labor Exemption*, 72 MINN. L. REV. 1379, 1413 (1988) ("[U]nion managers may have incentives of their own, which conflict with the interests of the majority: to maintain large membership rolls to enhance their own power and prestige as leaders of a large organization and maintain or increase union revenues from dues-paying members."); Bruce A. Herzfelder & Elizabeth E. Schriever, *The Union Judgment Rule*, 54 U. CHI. L. REV. 980, 980 (1987) ("[U]nion leaders might advance interests of their own rather than interests of the union's rank and file.").

²⁶² Thus, even in criminal law, where the power of enforcement is thought to lie exclusively in the state, laws have changed to involve criminal victims more actively in the prosecution and sanctioning of violators. See Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 22 (1999) ("In the fifteen years since the issuance of the [President's Task Force on Victims of Crime] Final Report [in 1982], there has been a literal explosion of federal and state action to increase crime victim access to and participation in the criminal justice process. It has largely centered on establishing and interpreting crime victims' rights to notice of and presence and hearing at critical stages of the criminal justice proceedings.").

proach would not require major changes to current participatory processes. It would, however, require substantial revamping of standing law to allow interest groups to intervene in civil suits brought by the government, and to bring their own suits to remedy past violations in the face of enforcement inaction by the government.

Deliberative participation demands that interest groups be able to participate as intervenors, with the rights of parties, when the federal government brings a civil suit, even when the suit is for a penalty paid to the United States for purely past prescribed conduct. Currently, private entities would not have standing to intervene in such a suit unless they could show that the penalty would deter future violations. Obviously, the courts would have to relax this standing limitation. If the courts did so, other elements of the law with respect to intervention would not need to change. Citizen groups that met standing requirements would be allowed to intervene;²⁶³ as parties, these groups could then engage in discovery, present evidence, and generally provide a backup to the government enforcement. If the government decided to settle the case, then deliberative participation would require that the public's right to comment be extended to settlements involving civil penalties. Intervening interest groups would have to be allowed to comment on the proposed settlement, which would then be subject to judicial review to ensure that the government did not unreasonably give short shrift to the interests of the intervenors.²⁶⁴ In essence, this is only what the law already provides in cases not involving penalties. Other than changing standing limitations, the most significant change from existing law would be that the judge would apply the standard that courts have used to review agency action under the federal Administrative Procedure Act—the hard look test—rather than simply rubber stamping agreements between the government and the violator.

Under hard look review,²⁶⁵ a court determines whether an agency considered all relevant factors and whether an agency developed a rational connection between the evidence in the administrative record and an agency decision to settle.²⁶⁶ Most importantly, hard look review requires the agency to explain why it acted as it did²⁶⁷—in this context, to explain why it chose to

²⁶³ See *supra* notes 40–47 and accompanying text.

²⁶⁴ See *supra* notes 49–50 and accompanying text.

²⁶⁵ Judge Leventhal explained the doctrine of hard look review in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), where he wrote:

Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, . . . but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a “hard look” at the salient problems, and has not genuinely engaged in reasoned decision-making. If the agency has not shirked this fundamental task, however, the court exercises restraint and affirms the agency’s action even though the court would on its own account have made different findings or adopted different standards.

Id. at 851 (citations omitted). The Supreme Court has essentially adopted the “reasoned decisionmaking” approach to judicial review. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

²⁶⁶ See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (“Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one.”).

²⁶⁷ For discussion of what the hard look doctrine requires, see Jim Rossi, *Redeeming Judi-*

settle the case in the face of arguments by intervenors that the settlement was inappropriate. Federal courts applying this standard of review to environmental enforcement proceedings should evaluate the entire settlement process to ensure that the agency has kept itself and intervenors informed about factual matters, as well as the likelihood that the settlement will cure the violation and deter future violations. If the court finds that the proposed consent decree is arbitrary and capricious, it should refrain from imposing its own solution on the conflict and send the parties off either to try the case or return to negotiations. By refraining from ruling, the judge avoids transferring the primary decisionmaking responsibility to the courts.²⁶⁸

If the agency decided to pursue administrative enforcement, deliberative participation would not demand drastic changes in the procedural mechanisms for involving private interest groups. The most far reaching change would open the compliance order process to citizen participation. Interest groups would have to be sufficiently empowered to allow them to seek judicial scrutiny of any final compliance order worked out by the agency and the violator. A notice-and-comment proceeding with respect to any compliance order agreed to by the agency and the violator would suffice. An agency would not have to allow citizen groups to participate on precisely the same footing as the agency and violator.

If the agency proceeded by formal adjudication, a citizen group's role would be very similar to its role as an intervenor in a civil action—providing witnesses, cross-examining other parties' witnesses, and filing briefs. As in the context of civil suits, intervening groups could not veto any settlements between the agency and violator, but could subject them to judicial scrutiny. If the agency proceeded by informal adjudication, citizen group participation would have to be tailored to avoid forcing the agency to forfeit the flexibility and cost savings gained by proceeding informally.²⁶⁹ Again, the agency could comply with such a mandate simply by providing meaningful notice of the enforcement proceeding and allowing interested citizens groups to file comments regarding their views of appropriate enforcement action. Because agencies are not limited to hearing cases and controversies, there is no need

cial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry, 1994 WIS. L. REV. 763, 774 (1994); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 128–29 (1994) [hereinafter Seidenfeld, *A Syncopated Chevron*]; Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 518 n.163 (2002) [hereinafter Seidenfeld, *Cognitive Loafing*].

²⁶⁸ See, e.g., Seidenfeld, *A Syncopated Chevron*, *supra* note 267, at 126–27 (discussing potential of the administrative state to implement the “deliberative democratic ideal” of government decisionmaking); Seidenfeld, *supra* note 178, at 1547, 1571 (discussing the role of judicial review in the administrative state).

²⁶⁹ Arguably, 5 U.S.C. § 555(b) already provides a statutory basis for interested persons to participate in such an informal adjudication. See 5 U.S.C. § 555(b) (2000) (“[A]n interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise . . .”). Although courts have recognized that § 555 applies to informal adjudications, see, e.g., *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990), I am aware of no court that has imposed an obligation on an agency to allow nonparty interested persons to appear before the agency in an informal adjudication.

to modify standing law to allow interest groups to participate before the agency in any of these contexts. Standing law would have to be modified, however, to allow interest groups to seek judicial review of agency sanctions with which the group disagreed. Other than changes in standing law, the major change demanded by deliberative participation is that courts employ the traditional hard look standard when reviewing agency action, although a court would have to take into account that an agency has a legitimate interest in keeping down the costs of informal enforcement proceedings.

Finally, if the agency takes no action at all, deliberative participation would require that citizens groups be able to force the agency or a court to address the violation. Thus, the law implementing this approach would have to allow a citizen to file suit seeking regulatory compliance and penalties to be paid to the government. Creation of such a broad right to sue would require a significant change in the Supreme Court's standing jurisprudence to allow Congress to create legal rights in nonconcrete interests that sufficed for plaintiffs to have standing to sue. Alternatively, Congress might be able to confer standing on citizen plaintiffs by replacing citizen suits with *qui tam* actions, which grant "relators" a right to a portion of fines paid to the government upon successful prosecution, because the Supreme Court has held that relators have a sufficient interest to satisfy Article III standing.²⁷⁰

Citizen suits under the deliberative participation approach would also require some modest changes in the EPA's authority to take over prosecution of such suits. Requirements of notice would remain, but, to prevent interest groups from abusing this power, the agency would be able essentially to take over prosecution of the violation either by filing its own civil suit or by initiating an administrative enforcement proceeding prior to the commencement of the citizen suit.²⁷¹ An interest group would then be able to participate in these government proceedings as it would had the government initiated the proceedings without being prompted by the group's notice of intent to file a citizen suit. The government would be able to stop a citizen suit at any time but only by moving either for intervention into the proceeding or for a stay in the case and a determination that the agency should exercise primary jurisdiction.²⁷² Consistent with this approach's focus on deliberation, once a citizen suit was filed, the court in which the suit was pending would demand from the agency an explanation of why the enforcement proceeding should be pursued by the government rather than the private citizen group, and the ultimate decision about whether the citizen suit continues would be left to the court.

²⁷⁰ See *Vt. Agency of Natural Res. v. United States ex. rel. Stevens*, 529 U.S. 765, 778 (2000).

²⁷¹ Currently, once an interest group provides notice of intent to sue, federal or state enforcers can stop a citizen suit by commencing a civil prosecution; an administrative proceeding is not adequate unless begun prior to the interest group's notice of intent. See *supra* notes 96–100 and accompanying text.

²⁷² Currently the federal and state governments cannot stop a citizen suit from progressing so long as the suit has already been filed within 120 days of the plaintiff's notice of intent to sue. See *supra* note 100 and accompanying text.

2. Critiques of Deliberative Participation

Just as the presence of a public interest group at the negotiating table decreases the likelihood of capture by increasing its costs,²⁷³ judicial review, in effect, occupies a fourth chair at the table and raises the stakes of capture and corruption even higher. The use of judicial review as a check on stakeholder monitoring of the agency is especially useful because it obviates the need for stakeholders to act cooperatively within the deliberative participation system of enforcement. Moreover, the insulation of sitting judges from the political process and the structure of the judiciary as an institution in which power is distributed between many judges who act independently in their particular cases makes the prospect of effective capture of the entire branch unlikely.²⁷⁴ More significantly, knowledge of judicial review is likely to alter agency behavior and shape the parties' willingness to listen to minority voices and comments because the parties know that ultimately the agency will have to acknowledge those voices to satisfy judicial review;²⁷⁵ if viewpoints are ignored, the ignorance must be justified.

The bane of deliberative participation, however, is the likely cost and delay it would impose on the enforcement system. Essentially, it relies on a system of open government and reasoned decisionmaking with a check provided by judicial review, rather than a system of backroom deals, with participation as a check on outcomes. As such, it suffers many of the inefficiencies of the adversarial legal system.²⁷⁶

For example, justification, especially if it must be supported by a factual record, makes demands on agency resources. There are means that willing courts could use to reduce the costs and delays that agencies would have to bear to meet a reasoned decisionmaking standard. For example, courts could

²⁷³ See AYRES & BRAITHWAITE, *supra* note 10, at 71–73.

²⁷⁴ There is considerable debate about the extent to which judges base their decisions on politics in the sense of ideology. See, e.g., William S. Jordan, III, *Judges, Ideology, and Policy in the Administrative State: Lessons from a Decade of Hard Look Remands of EPA Rules*, 53 ADMIN. L. REV. 45, 98–99 (2001) (arguing that the evidence contradicts an inference that judicial review of agency action is influenced by political ideology); Seidenfeld, *Cognitive Loafing*, *supra* note 267, at 518–19 nn.167–68 (“The jury is still out on the extent to which judges vote based on ideology in various contexts.”). But see, e.g., Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2175 (1998) (arguing that “[p]artisanship clearly affects how appellate courts review agency discretion”); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1766–67 (1997) (arguing that empirical evidence “support[s] the theory that D.C. Circuit judges employ a strategically ideological approach to judging”). I am not aware, however, of anyone contending that judges are susceptible to politics in the sense of being swayed by lobbying or popular support for a particular ruling.

²⁷⁵ See Seidenfeld, *Cognitive Loafing*, *supra* note 267, at 513–14 (“[T]here is good reason to believe that rulemaking staff at many agencies do worry from the outset about pleasing a court should the rule be challenged, and therefore do not commit to an outcome before taking such review into account.”); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 491–92 (1997) (discussing how courts applying hard look review will require the agency to “allow broad participation in its regulatory process and not disregard the views of any participants”).

²⁷⁶ See KAGAN, *supra* note 261, at 217 (describing the inefficiencies of agencies seeking information to protect themselves against interest group challenges under a system that demands comprehensive rationality).

take into account contentions that costs did not warrant more careful consideration of how the agency should proceed, and assess whether the agency acted reasonably in deciding whether to pursue compliance in light of the information it possessed and the cost of better information. Courts would have to refrain from imposing their own remedies in particular cases, thereby usurping the role of the parties in reaching an outcome after appropriate deliberation. Unfortunately, there is no way to give courts discretion under hard look review and still guarantee that they would abide by these dictates.²⁷⁷

In addition, if the agency and interest groups are to act as meaningful checks on each other, the abilities of interest groups to maintain private enforcement suits and agencies to take over enforcement in a large number of cases filed by interest groups will both have to be expanded. In this time of political support for less government intervention in the affairs of business and for lower taxes, it is doubtful that Congress is going to empower interest groups to bring more suits or give agencies budgets to do so. Given this political climate, the most likely scenario is one in which Congress continues to allow citizen suits in limited contexts, and treats such suits as a free means of enforcing environmental regulation, even as the courts struggle to limit the influence of interest groups on regulatory prosecutions. In addition, the Supreme Court does not seem interested in expanding standing to allow interest groups to get to court either to obtain judicial review of enforcement decisions or to bring citizen suits.

Conclusion

There is a tension between citizen participation in environmental enforcement and an agency's discretion to choose the optimal balance between deterrence and cooperative approaches to enforcement. Citizen participation can reduce the costs of monitoring violations and their effects and can alleviate some of the burden of prosecuting violators. In turn, cooperative enforcement can reduce monitoring costs by encouraging regulated entities to provide information on their regulatory performance and can decrease compliance costs for those entities. Cooperative enforcement can also focus compliance efforts on violations that cause net harm to the society. To ensure that the agency does not abuse the discretion granted to it under this approach, however, cooperative enforcement itself must be monitored. At some level, citizen participation threatens to undermine the effective use of cooperative enforcement. Although citizen participation provides a mechanism for controlling agency abuse under the cooperative enforcement model, such participation also scares regulated entities by empowering citizens groups to take unreasonable stands, and hence discourages companies from self-reporting violations and acting candidly about what it will take to bring their plants into regulatory compliance.

²⁷⁷ Cf. Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 61 (1995) (identifying unpredictability of judicial review as one reason why agencies avoid rulemaking); Seidenfeld, *supra* note 275, at 492-93 (discussing how the unpredictability of hard look review "freezes" agency action).

This Article suggests three approaches to alleviate this tension and thereby capture the benefits of both citizen participation and a balanced model of enforcement. The Article shows that although each of these three approaches—tripartism, corporatism, and deliberative participation—holds some promise, each also raises significant concerns that prevent it from being the ideal means of implementing participation in regulatory enforcement.